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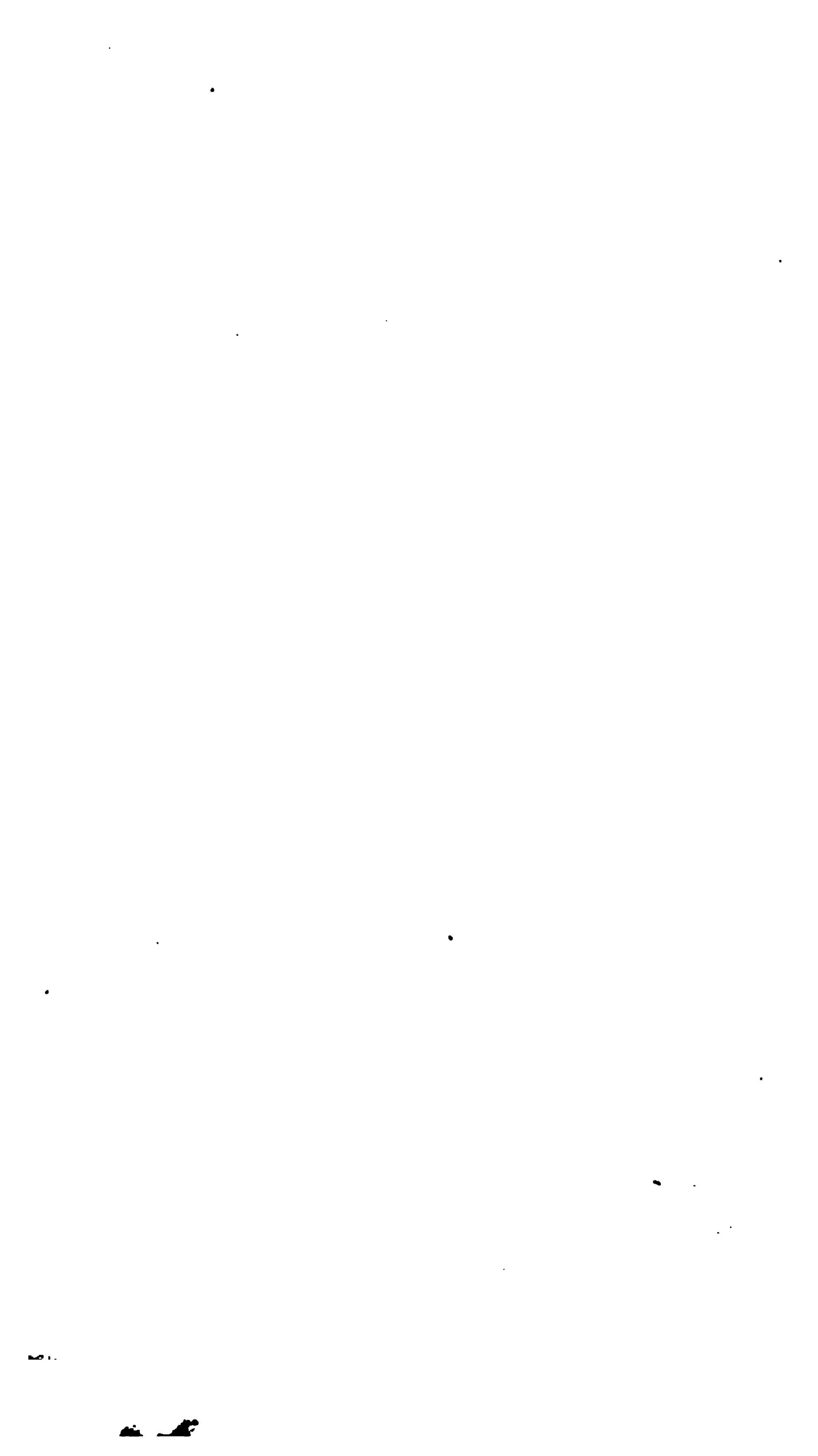
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
High Court of Chancery,
DURING THE TIME OF
LORD CHANCELLOR ELDON.

VOL. I.

1812—1813. 22—53 GEO. 3.

BY
FRANCIS VESEY, AND JOHN BEAMES,
Esqrs. of LINCOLN'S INN,
BARRISTERS AT LAW.

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1813.



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CASES IN CHANCERY, &c.

1811, 51 Geo. 3.

WOOD, *Ex parte*(a).

1811,
Feb. 5, 6.

THE Petition stated, that a Commission of Bank- Protection of
ruptcy issued against the Petitioner *Alfred Wood* Commissioners
and his Partners *William Andrew Wood* and *John Birch*, of
Manchester, Cotton Merchants; dated the 22d of
December, 1810; under which they were duly declared
Bankrupts; and by the Summons of the Commissioners, plication of the
dated the 2d of *January*, 1811, the Bankrupts were re- Bankrupt the
quired to surrender themselves to the said Commissioners Day after he
or the major Part of them forthwith and on the 19th was served with
and 21st Days of *January*, 1811, and the 16th of Notice, and be-
February next, at the *George Inn, Manchester*, to be fore the first
examined by the said Commissioners touching the Discos- public Meet-
very and Disclosure of their Estate and Effects. The ing, good.
Petitioner in pursuance of the said Summons surrendered Plaintiff in the
himself to the major Part of the Commissioners on the Action to dis-
3d of *January*, 1811, the Day after it was served on charge the
Bankrupt; and the Officer to
pay the Costs.

(a) 1 Rose's Bankrupt Cases.

Vol. XVIII.

B

him;

CASES IN CHANCERY.

1811.
—
Wood,
Ex parte.

Progress, and present Practice, of the Bankrupt Laws, 1st Vol. 132,) has stated the Reasons against the Validity of such a Protection: in effect 1st, that the Terms of Reference in the 5th Section of the Act 5th George 2d, c. 30, " having surrendered " as aforesaid," and " such " Summons or Notice," can apply only to a Surrender after, and in consequence of, the Notice, that the Party is declared Bankrupt; in the first Section directed to be left at the Bankrupt's Place of Abode, or to be served personally, if he is in Prison; and the Notice, to be published in the *London Gazette*, that the Commission has issued, and of the Time and Place of Meeting: 2d, that the Submission to be examined must mean at a Time, and Place, advertised for Creditors to attend: 3d, that the Protection for a Period, exceeding Forty-two Days, is a Violation of the Language of the Act: 4thly, that the Protection is directed to be given in *order to* his Attendance upon his Assignees; who are not chosen for some Time after the Commencement of the Forty-two Days: 5th, the Evi-

dence of Collusion; where the Bankrupt appears, and claims Protection, immediately upon the Adjudication.

The following are the principal Reasons, that seem by a fair Construction of the Act of Parliament to support the Practice, which has now the Sanction of high Authority; to give the Protection upon the Bankrupt's Application at any Time after the Declaration of Bankruptcy.

The 5th Section of the Statute 5th George 2d, c. 30, directing, " that the Bankrupt shall be free from Arrest in coming to surrender, and from the actual Surrender of such Bankrupt to the said Commissioners for and during the said Forty-two Days" (mentioned in the first Section), in Terms applying to the full Period, upon general Principles of Construction supposes a Surrender previous to its Commencement; and cannot, without some Violence to Language, be understood as the Remainder of the Time from the first public Meeting; necessarily short by some Days of that full Period, described in Terms intelligible and plain. A remarkable

CASES IN CHANCERY.

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markable Difference of Expression occurs in the preceding Part of the same Section; giving the Bankrupt Liberty to inspect his Books, not "for and during" but "at all seasonable Times" "before the Expiration of the Forty-two Days:" correctly marking the Distinction, that during a Part of the Period there would not, except in the Case of a provisional Assignment, be Assignees; in whose Presence, or by whose Authority, the Inspection is to be had. The subsequent Words "and in order thereto," which, understood as relating to the Bankrupt's Attendance on his Assignees, would raise the same Objection to a Surrender at the first public Meeting, refer with more Propriety to the immediate antecedent; "the better to enable the Bankrupt to make a full Discovery."

Such being the plain Interpretation of the 5th Section, there is nothing in any other Part of the Act, necessarily requiring a Construction, not merely strained; but perfectly inconsistent with that. The Qualification as to the Manner of giving Notice

is added in the first Section for very special Purposes; that the Creditors shall be distinctly apprised of the Period, within which they will have the Opportunity of proving their Debts, and examining the Bankrupt: for the more important Object of insuring to the Bankrupt Notice, and marking with Precision the Time, when he will incur the severe Penalty, imposed on his Omission to surrender. The Reference in the 5th Section, if applied to the Notices, mentioned in the first, may be well understood without including the Qualification, as to the Mode of giving Notice, added with a particular View to the direct Objects of the first Section; having no Connection, and clearly inconsistent, with the Provisions of the 5th; but, attending to the expired Act 5th George 1st, c. 24, s. 1, the Foundation of the Argument from this supposed Reference wholly fails: and the Cause of the Difficulty in construing the subsequent Act is obvious: the Adoption, almost in Terms, of the Clause, imposing Penalties upon a Violation of the Protection; not adverting to the

1811.
Wood,
Ex parte.

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1811.
~~
WOOD,
Ex parte.

important Change in its Nature and Limits. The former Act giving the Protection only "in going to, staying with, " or coming from, the said Commissioners, in case such Bankrupt shall attend the said Commissioners in Obedience to any Notice or Summons from them," such Summons or Notice was the proper Evidence, as it was the sole Basis, of the Protection, granted upon Attendance in Obedience to it under that Statute; but those Terms are perfectly irrelevant to the more beneficial and extended Protection, to which the later Statute gives the Bankrupt a positive Right; not depending upon any Summons or Notice to attend the Commissioners. The Clause, which, as it stood in the prior Act, evidently had relation to the particular Notice or Summons immediately preceding, not to the Notices, previously mentioned in the first enacting Part of the Section, is inadvertently copied into the subsequent Act; with this only Difference; that the Notice or Summons is there described as signed by the Com-

missioners or Assignees: a Notice or Summons, signed by the Assignees, not being before mentioned.

The Description in the 2d Section of the Statute 5th George 2d, "the said Forty-two Days so appointed as aforesaid for the Bankrupt to surrender and conform as aforesaid," may be referred to the Case, supposed by the first Section, of a Bankrupt deferring his Surrender; and is not inconsistent with a voluntary Surrender in the first Instance. The Surrender to the Commissioners is not required to be in the Presence of Creditors. It is rather a preliminary, private, Transaction; indicating the Bankrupt's Submission; who is not expected at an early Period to be prepared to go into the Examination; and Creditors are never permitted prematurely to compel him.

The Objection from the Appearance of Collusion is not so easily answered; but, though it must be admitted, that this is too frequently obvious, it is by no means a necessary Inference. From the Uniformity of Time and Place, and the Facility of obtaining

obtaining Intelligence, when and where Commissions are opened, it is not difficult to suppose a Person, apprehending such a Proceeding, taking the Means of ascertaining the Fact; and reluctantly claiming the Benefit of a Process, which he cannot resist. This Objection would be easily removed by appointing a Meeting on the Day after the Declaration of Bankruptcy, (as in *Wood's Case*), for the Purpose of receiving the Surrender; which, if required by the Bankrupt, could not be refused: but the prevailing Practice is permitted by Commissioners from the proper Motive of avoiding Expence.

If the Construction, which this Reasoning attempts to support, corresponds with the Letter, it is surely most conformable to the Spirit, of the Law. Equality among the Creditors is the general Principle of the Bankrupt Law. With that View, from the Moment, when the Declaration of Bankruptcy ascertains, that the Commission is to proceed, which may finally supersede the private Remedy of each Individual, Means are provided, by which the Bankrupt, not being then

in Custody, may be protected for a certain Period from the Arrest of any one Creditor for the Benefit of all; not however, in that Stage, interfering with a Creditor, who has so far advanced his legal Right, as to have the Bankrupt then in Custody. Is it possible to attribute to the Legislature an Object so capricious, and irrational; that several Days, always including a Portion of the Forty-two, "*for and during*" which the Bankrupt is by express Declaration free from Arrest, are without an assignable Motive to be lost; while the Bankrupt, who might be actively employed for the Benefit of his Creditors in arranging his Affairs, driven from his Home, and deprived of his Property, is evading the Pursuit of some one Creditor, who, against the general Spirit of the Bankrupt Law, seeks to gain an Advantage over the others, which he can obtain only in the Interval before the first Meeting? That such was not the Object is evident by tracing the Difficulty to its true Source, the Misapplication of Terms, used in the expired Act, to a different State of Circumstances,

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—
WOOD,
Ex parte.

CASES IN CHANCERY.

1811.
 Wood,
Ex parte

stances, with which they have no Connection.

It may be useful here to notice a late Decision of the *Lord Chancellor*, that a Bankrupt, attending the Commissioners under their Summons, is protected even from the Process of the Crown; as a Witness or Party attending a Court of Justice; if not under the Statute; and, if, according to Lord Coke (11 Co. 69 to 75 *Magdalen College Case*) the Rule, that the

Crown is not bound by general Words of an Act of Parliament, admits Limitation from the implied Intention, the Nature and Object of the Act, it is difficult to conceive, that the Legislature could mean to place the Bankrupt in such a Situation: exposed to any Civil Process, while attending in Obedience to the Act of Parliament, under the Penalties of Imprisonment and Death.

ROLLS.

1810,
 Nov. 20.

Implied Satisfaction of a Debt from a Father to his Child by a Marriage Portion of a greater Amount.

CHAVE v. FARRANT.

JOHN BROOM by his Will, dated the 18th of July, 1786, gave to his Grand-daughters *Mary, Sarah, and Betty, Farrant*, and to each Child, that shall or may hereafter be born of his Daughter *Sarah Farrant*, and living at his Decease, the Sum of £150, to be paid to each of them by his Executors within Six Months next after his Decease; to whom he gave and bequeathed the same accordingly.

The Testator died on the 20th of July; leaving the Three Grand-daughters named in the Will, all Infants. *John Farrant*, their Father, died in 1807; having by his Will devised his real Estates to his Sons, with Limitations to their Children in Tail and the ultimate Remainder to his own right Heirs; subject to a Trust Term of Five Hundred Years, to raise certain Legacies and Sums of Money,

CASES IN CHANCERY.

9

Money, and also such farther Sum of Money as should be sufficient to pay all his just Debts, whether on Bond, simple Contract, or otherwise, after applying his Goods and Chattels, and the Part of his personal Estate, after bequeathed in Discharge of such Legacies and Debts, as far as the same would extend; and he gave all the Residue of his personal Estate to his Executors upon Trust to apply the same in Discharge of his Legacies and Debts.

1810.
~~
CHAVE
v.
FARRANT.

The Bill was filed by the Three Grand-daughters of the Testator *Broom*, with their Husbands; claiming their Legacies of £150 with Interest under his Will.

The Answers by the Executors, the Widow and Sons of *Farrant*, represented, that *John Farrant* maintained, cloathed and educated, the Plaintiffs, his Daughters, at an Expence much exceeding their Legacies under the Will of their Grandfather; and he also gave to or in Trust for each of them a Marriage Portion of £1000; and no Demand was made by any of them in his Lifetime: therefore the Defendants insist, that the Plaintiffs are barred of all Claim to recover the Legacies under their Grandfather's Will.

Sir Samuel Romilly, and Mr. Shadwell, for the Plaintiffs.

The MASTER of the ROLLS.

Upon looking into the Settlements I find nothing, from which any Inference can be drawn as to the Intention of the Parties. In Mrs. *Chave*'s her Father covenants to pay £1000 for the Portion of his Daughters. It does not appear that the Husbands knew of the Debts. My Opinion is, that the Father, giving the Portion, must be taken as meaning to satisfy the Debt he owed as Executor of the Grandfather. That is established in Opposition to

Chidley

CASES IN CHANCERY.

1810.
 ~~~~~  
 CHAVE  
 v.  
 FARRANT.

*Chidley v. Lee (a)* by the more recent Cases *Wood v. Briant (b)* and *Seed v. Bradford (c)*. In *Wood v. Briant* Lord Hardwicke says, "there are very few Cases, where a Father will not be presumed to have paid the Debt he owes to a Daughter, when in his Life-time he gives her in Marriage a greater Sum than he owed her; for it is very unnatural to suppose, that he would choose to leave himself a Debtor to her, and subject to an Account."

In *Seed v. Bradford* those Principles were adopted; and applied to that Case; which was a Bequest, not of a Residue, but of a Sum of Money.

The Bill therefore, as far as it seeks Payment of the Legacies to Mrs. Chave and Mrs. Poole, must be dismissed: as to Mrs. Marson her Portion is not given so as to amount to a Satisfaction. As to her Legacy therefore there must be a Decree for Payment (*d*).

(a) *Pre. in Ch. 228.*

(b) *3 Atk. 521.*

(c) *1 Ves. 501.*

(d) *Hartopp v. Hartopp,*

*Ante, Vol. XVII, 184. Ben-*

*gough v. Walker, Ante, Vol.*

*XV. 507, and the References*

*in the Note (a), 510.*

ROLLS.

1810,  
 Nov.

Misrepresenta-  
 tion, though in  
 a slight De-  
 gree, is an Ob-  
 jection to a  
 specific Per-  
 formance.

THE Bill prayed the specific Performance of an Agreement, by which the Defendant contracted to sell the Fee-simple of certain Premises for the Sum of

(a) *Ex Relatione.*

Distinction upon a Bill to rescind the Contract.

£600

£600, payable by Instalments. The Agreement was signed by both Parties; and the Defendant having received Part of the Purchase-money, resisted the Performance on the Ground, that the Plaintiff, who was his Agent, had misrepresented the Value of the Estate; producing Evidence, that it was worth near £1200; also that, the Plaintiff had previously to the Agreement represented to him, that the Houses had been injured by a Flood, and would require between £50 and £60 to repair them; whereas in Truth the Premises at the Time of the Contract required no more than Forty Shillings to put them in compleat Repair. No Evidence of the Value of the Premises was entered into by the Plaintiff: but the Defendant in his Answer admitted, that the clear yearly Rent amounted to £49; and stated, that in 1805 he had purchased these Premises for £700; and had afterwards expended £300 in repairing them.

1810.  
~~~  
CADMAN
v.
HORNER,

The Master of the Rolls.

The Evidence of the Inadequacy of the Price in this Case is considerably shaken by the Defendant's Admission of the clear Rent of the Premises. It is difficult to conceive, that he could be ignorant of the Value; having so recently purchased the Estate; and laid out Money in the Improvement of it; and it is not easy to comprehend his Conduct: nor does Misrepresentation by the Plaintiff in regard to what was requisite for the Repairs of the Houses by any Means account for the Disparity between the Price, paid for the Estate, and the Sum, at which the Witnesses value it: yet, as upon the Evidence the Plaintiff has been guilty of a Degree of Misrepresentation, operating to a certain, though a small, Extent, that Misrepresentation disqualifies him from calling for the Aid of a Court of Equity; where he must come, as it is said, with clean Hands. He must, to entitle him to Relief, be liable to no Imputation in the Transaction.

This

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1810.
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 CADMAN  
 v.  
 HORNER.

This is not a Case, where the Court is called upon to rescind an Agreement, and to decree the Conveyance, executed in pursuance of it, to be delivered up to be cancelled; which would admit a different Consideration.

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The Bill was dismissed without Costs.

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ROLLS.  
 1811,  
 Feb. 13, 14. 18.

## COOKE v. CLAYWORTH.

General Rule that a Court of Equity will not assist a Person, who has obtained, or wishes to get rid of, an Agreement, or Deed, on the mere Ground of Intoxication.

Exception, where any Contrivance was used to draw him in to drink; or any unfair Advantage made of his Si-

tuation: or that extreme State of Intoxication, depriving a Man of his Reason; which even at Law would invalidate a Deed.

A single Witness, not corroborated, not sufficient against positive Denial by the Answer.

THE Bill prayed, that an Agreement in writing, executed by the Plaintiff, may be declared fraudulent and void, as against him; and may be decreed to be delivered up to be cancelled; and an Injunction.

The Plaintiff by his Bill represented, that on the 11th of June, 1807, he met by Appointment at Spilsby in the County of Lincoln several Persons; of whom he had made Purchases; in order to pay them: one of those Persons being the Defendant Taylor; and, after that Business was concluded, the Plaintiff was prevailed upon to drink, until he was intoxicated; that in that State he left Spilsby about Six in the Evening, accompanied by Taylor; and they stopped at the House of the other Defendant Clayworth; to whom also the Plaintiff had a Payment to make. They found him at

Home,

## CASES IN CHANCERY.

13

Home, drinking with some other Persons; and they all continued drinking for a considerable Time; the Plaintiff returning Home about Half past Two in a State of compleat Intoxication; and the Agreement was obtained from him, while in that State, and utterly unable to understand, what he was doing.

1811.

—

Cooke

v.

Clayworth.

The Defendants by their Answer denied, that the Plaintiff was solicited to drink; stating, that he continued to do so of his own free Will; and was disqualified from transacting Business of Difficulty and Importance; that the Agreement arose from *Clayworth's* stating a Dispute with his Landlord; who threatened to turn him out of his Farm; upon which the Plaintiff made the Offer. The Answer then stated the Agreement; which was most inaccurately expressed: in Effect, that *Cooke* agrees to let all the Lands and Tenements he occupied in the Parish of *Brough*, or elsewhere; and *Clayworth* and *Taylor* agree to take the Land to rent for Twenty Years; to commence at *Lady-day 1808*; stating the Terms; and that *Cooke* agrees to give Possession at the Time before mentioned: that it was signed by all the Parties on the 11th of *May*, 1807; witnessed by *Robert Marshall*; that it was prepared by *Marshall*; but dictated by the Plaintiff: and was executed at Twelve o'Clock at Night.

It was proved, that *Marshall*, a School-master, was called out of Bed to prepare the Agreement. There was much Contradiction in the Evidence as to the Plaintiff's Situation: some of the Witnesses stating, that he was in a high Degree of Intoxication; and came Home in that Situation about Two in the Morning: others representing him as perfectly sober and fully competent to transact Business.

Sir

1811.

—

COOKE

v.

CLAYWORTH.

*Sir Samuel Romilly, and Mr. Horne, for the Plaintiff.*

This is an Agreement, fraudulently obtained from a Man, while in a State of Intoxication; which is apparent on the Face of the Agreement; compared with the Account, given by the Defendant, and the Evidence. The Evidence upon the Face of the Instrument is the strongest: the Parts interpolated, making this a binding Agreement upon the Plaintiff, as a Demise, being in a different Ink. Independent of the Intoxication, a Court of Equity would not only refuse to perform such an Agreement, but would decree it to be delivered up. This cannot be supported upon the Principle, stated in *Cory v. Cory* (*a*), as a reasonable, proper, Agreement; and there is Evidence, that he was drawn in to drink; according to the Distinction, taken in *Johnson v. Medlicot*, (*b*). In that Respect this is distinguished from the Case of *Cragg v. Holme* (*c*); where the Court refused a specific Performance of an Agreement, made in a State of Intoxication; though no Advantage was taken: a Court of Equity not interposing on either Side in the common Case of Intoxication: but, if the Party is brought into that State by him, who obtains, and seeks Advantage from, the Agreement, the Intoxication is Part of the Fraud; which gives the Right to Relief.

(*a*) 1 *Ves.* 19.(*b*) 3 *P. Will.* 131, Note(*a*).

(*c*) At the *Rolls*, May, 1811. From a MSS. Note it was stated, that the Bill for a specific Performance was dismissed without Costs; though the Plaintiff had not

contributed to make the Defendant drunk; or taken any Advantage of his Situation; and the *Master of the Rolls* said, he would not have decreed the Agreement to be delivered up; that the Court would not act on either Side.

The

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The Rule however against interposing on either Side in the common Case of Intoxication cannot apply in this Instance. This Agreement, as it has been altered, though not so originally, amounts to a Demise; and upon that Ground the *Lord Chancellor* upon the Terms of giving immediate Possession, if the Bill should be dismissed, continued the Injunction against an Ejectment, brought by the Defendant. The Bill in Truth therefore seeks to have delivered up, not an Agreement, but a Lease; which appears in Evidence to have been converted into a Lease from an Agreement, after it was signed.

18<sup>t</sup> 1.

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Cookx
v.

CLAYWORTH.

Mr. Hart, and Mr. William Agar, for the Defendant, distinguished this from a Bill for the Performance of a Contract; insisting, that to obtain this Relief, the Plaintiff must shew a specific Fraud practised upon him; making it unconscientious to retain the Effect of it: the Rule being clear, that Intoxication simply gives no Protection; the Responsibility is thrown upon the Party himself, unless he can shew, that undue Advantage was taken of his Situation by those, who brought him into it with a View to that Advantage.

The MASTER of the ROLLS.

Retaining the Opinion which I stated in the Case, that was alluded to in the Argument, I think, a Court of Equity ought not to give its Assistance to a Person, who has obtained an Agreement, or Deed, from another in a State of Intoxication; and on the other Hand ought not to assist a Person to get rid of any Agreement, or Deed, merely upon the Ground of his having been intoxicated at the Time: I say merely upon that Ground; as, if there was, as Lord Hardwicke expresses it in *Cory v. Cory* (a), any unfair Advantage made of his Situation, or as Sir Jo-

Feb. 13.

(a) 1 Ves. 19.

seph

CASES IN CHANCERY.

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 Cooke  
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Sept Jekyll says in *Johnson v. Medlicott* (a), any Contrivance or Management to draw him in to drink, he might be a proper Object of Relief in a Court of Equity. As to that extreme State of Intoxication, that deprives a Man of his Reason, I apprehend, that even at Law it would invalidate a Deed, obtained from him, while in that Condition.

After a very attentive Consideration of the Evidence in this Case I can find no Ground, on which upon the supposed State of Intoxication of the Plaintiff the Court could be warranted in decreeing this Deed or Agreement to be delivered up to be cancelled. There is a Contrariety of Evidence as to the Fact of Intoxication, upon which it is not easy for this Court to decide. There are Three Witnesses, who all swear, that at the Time of Execution the Plaintiff was perfectly sober and capable of Business: Marshall indeed says, he was as capable of transacting Business to any Extent as ever he was in his Life. Whatever Difficulty I may have in believing this after all the other Evidence, that has been produced, I should hesitate to determine a Fact, so controverted, without the Intervention of a Jury.

But, supposing the Intoxication proved to a considerable Extent, still the Inquiry would remain, whether the Conduct of the Defendants has been such as to furnish Ground for setting aside this Agreement. It is admitted, that there was no previous Design in bringing about the Meeting at the Defendant's House: the Bill stating, that the Plaintiff's calling there was the Proposition of the Plaintiff to Taylor. As to the Plaintiff's being drawn in to drink by Contrivance and Management, it is to be observed, that

(a) 3 P. Will. 130, Note (a).

the

the Drinking was not introduced on Account of his coming there, nor after he came there: but a Company engaged in drinking, he joined them. One Witness, *Mary Hall*, says, the Plaintiff was pressed, and almost forced, by *Clayworth* to drink: but her Testimony, not being corroborated by any other Witness, cannot prevail against the Denial of that Fact by the Answer (*a*).

As to the Manner, in which the Treaty was introduced, *Pedley*, the only Witness upon that, represents it as proceeding entirely from the Plaintiff; that the Defendant so far from holding out any Inducement, rather hesitated to accept the Offer. There is no Pretence, that the Offer was in its own Nature such as necessarily discovers Absence of Judgment in the Person making, or a Degree of Unfairness in those accepting, it.

In this State of the Evidence I cannot possibly hold, that the Plaintiff was by Contrivance and Management drawn in to drink; or that any unfair Advantage was taken of his Intoxication, to obtain an unreasonable Bargain. As to the Doubt appearing on the Face of the Paper, whether, as it stands, it contains what was dictated to the Plaintiff, read to him by *Marshall*, and afterwards by himself, the Investigation of that Point will be open at Law upon the Trial of any Action, founded upon this Instrument; and can be much better made there than here. Here indeed that has not been examined: it was only adverted to in the Course of the Hearing. That the Paper was not at first written, as it now stands, is quite apparent; and it will be rather difficult for the Witnesses, professing to have given a full Representation of the Transaction, to account for their entire Silence as to all, that must have been said, or done, before the Paper was brought

(a) See *Evans v. Bicknell*, *India Company v. Donald*, *Ante*, Vol. VI. 174. *The East Ante*, Vol. IX. 375.

1811.  
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COOK &  
v.  
CLAYWORTH.

## CASES IN CHANCERY.

1811.  
—  
Cooke  
v.  
Crayworth.

into its present State by the Introduction of the first Clause, and the consequential Erasures and Alterations. That however, as I have said, will be for another Tribunal, and in the View I have taken of the Case I can do nothing but dismiss the Bill without Costs, and dissolve the Injunction.

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1811,  
March 21.

LAVENDER, *Ex parte.*

Commission of Bankruptcy superseded, to defeat a Prosecution for omitting to surrender under Circumstances of erroneous Advice: no Fraud; and another Commission issued proceeding.

THE Prayer of this Petition was, that a separate Commission of Bankruptcy against the Petitioner might be superseded. The Bankrupt had not surrendered under that Commission: but a joint Commission being taken out afterwards against him and another Person, he surrendered and passed his Examination under that: and was immediately apprehended, taken before a Magistrate, and committed for the Felony by not surrendering to the former Commission; and the Prosecution was actually instituted.

The Petitioner by his Affidavit stated, that he was advised, that a separate Commission could not be taken out by a joint Creditor (*a*); that he had no criminal or fraudulent Intention; but under an Opinion, that the Advice he had received was legal and proper, and from that Cause alone, he was induced not to surrender.

Sir Samuel Romilly, and Mr. Hall, in support of the Petition, admitting, that it is now settled, that a separate

(*a*) *Ex parte Decastel*, XIV. 604, and the References *ante*, Vol. XVII. 247. *Ex parte Ackerman*, *Ante*, Vol.

Commission

Commission may issue on the Petition of a joint Creditor, observed, that it was a Point of some Novelty; introduced by the Case *Ex parte Elton* (*a*); and pressed, that under these Circumstances, the Mistake of a Solicitor, without any Intention of Fraud, and a joint Commission, free from Objection, subsisting, the separate Commission should be superseded; as was done by Lord *Macclesfield* (*b*).

1811.  
~~  
LAVENDER,  
*Ex parte.*

Mr. Parker, for the Assignees, suggested, that the Advice was given for an interested Motive; with the View to a joint Commission.

*The Lord Chancellor* at first hesitated; observing, that, though the Advice might have been given with the View to a joint Commission, if the Bankrupt acted honestly under it from the Influence of that Impression alone, the Prosecution was very harsh, yet that Ignorance of the Law would not protect him upon the Trial of an Indictment; though certainly a Pardon would be granted in such a Case. His Lordship however at length upon the Authority referred to made the Order, superseding the Commission, with Costs out of the Estate.

(*a*) *Ante*, Vol. III. 238. 1 *Atk.* 221.

(*b*) See *Ex parte Wood*,

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1810,  
Dec. 20.

1811,  
Jan. 23. 25.  
April 11.

Creditor, having among other Securities a Bond with a Surety, taking a Mortgage from the principal Debtor, and agreeing to receive the Residue by Instalments, secured by Warrant, &c. without Prejudice to any Security he now holds, Injunction granted against suing the Surety.

## BOULTBEE v. STUBBS.

**T**HOMAS Boultbee, being called upon by the Defendant, who was his Banker, for Security, procured his Brother Charles Boultbee, as Surety to join him in a Bond for £10,000; with a Stipulation, that Charles, the Surety, was to be liable only to the Extent of £6000; if upon the Account that Amount should be due. Upon a subsequent Settlement of the Account the Balance, due to the Banker, appearing to be £9500, Thomas Boultbee gave him a Mortgage for £4000: it was agreed between them, that the Residue should be paid by Instalments: and a Warrant of Attorney was given to confess Judgment for the Balance, but expressly without Prejudice to any Security Stubbs now holds for the said Sum, or any Part thereof. The Surety, being afterwards sued, filed the Bill; and moved for an Injunction.

Mr. Hart, Serjeant Palmer, and Mr. Heald, in support of the Injunction; cited *Rees v. Berrington* (*a*), and *Law v. The East India Company* (*b*).

Sir Samuel Romilly, and Mr. Wingfield, for the Defendant.

*The Lord CHANCELLOR.*

The Law of this Case is perfectly clear. The Circumstances upon the Face of the Bond are these. The Defendant, a Banker, unwilling to give *Thomas Boultbee* Credit to the Amount he wished upon his own personal Security, or upon the Credit and Security of the different

(*a*) *Ante*, Vol. II. 540.      (*b*) *Ante*, Vol. IV. 824.

Bills.

Bills and Notes, which he should pay into the Bank in the Course of his dealing, required a Bond for £10,000 from him, and from his Brother, as Surety ; under which the Surety was to be liable only to the Extent of £6000 ; if upon the Account that Amount should be due. On the Settlement of Accounts a Balance of £9500 appearing to be due, it is clear, that, if *Thomas Boultbee*, the principal Debtor, had given a Mortgage for £3500, that Security might have been given, and taken, without Prejudice to the Bond : but a Mortgage was given for £4000 ; reducing the Debt therefore below £6000 ; and as to the Residue of the Debt it was provided, that it should be paid by certain Instalments, fixed by the Instrument.

1810-11.

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BOULTBEE

v.

STUBBS.

The Consequence of this Transaction in Equity is, that, the Surety continuing liable for the Sum of £5500, remaining due upon the Settlement of Accounts, and the Creditor agreeing with the principal Debtor to postpone his Remedy, changing his immediate Right to sue to a Right to call for certain Instalments, the Effect of that Agreement is, that in Equity the Right against the Surety is gone. It is in vain to say, the Indulgence to the Principal by taking the Mortgage, and giving Time, may be for the Benefit of the Surety. It is in most Cases for the Advantage of the Surety ; but the Law takes so little Notice of that Circumstance, that if the Acceptor of a Bill becomes Bankrupt, the Holder must give Notice to Acceptor does the Drawer ; as another Person has no Right to judge, what are his Remedies ; and the original implied Contract being, that, as far as the Nature of the original Security will admit, the Surety, paying the Debt, shall stand in the Place of the Creditor.

Bankruptcy of  
Acceptor does  
not dispense  
with Notice to  
the Drawer.

The Cases, that have been alluded to, and there is a great Variety of them, are those of a Creditor, entering

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BOULTBEE

v.

STUBBS.

Composition
with Reserve of
the Remedy
against Sure-
ties valid ; but
must plainly
appear.

into a Composition with the Person, liable in the first Instance ; with a Stipulation, that it shall not prejudice his Remedies against others, who are liable as Sureties. The ordinary Case is that of Compositions upon Bills. The Answer given is, that by the Agreement, reserving the Creditor's Remedy against Sureties, the Situation of the Surety is not varied ; and this Doctrine has been held at Law as well as here : but I agree, that a Stipulation of that Kind is in many Cases so very absurd, that it must be seen plainly ; and the true Question is, whether these Words in the Warrant of Attorney, " without Prejudice to any Security," mean, that this Bond was to be saved against the Surety ; the Demand upon which was intended to be arranged by that very Transaction : or, whether the Meaning of those Words is not, that, the principal Debtor being in the Habit of giving Securities to the Creditor from Time to Time, this Transaction should liquidate the Matter of the Bond ; but should not prejudice the Banker's Right as to other Securities in his Hands. If that is the Meaning of this Transaction, it puts an End to the Right against the Surety : if, on the other Hand, the Object was to give as extensive a Remedy as was given in Mr. Burke's Case (*a*), then that Case and many others must govern this. My Opinion is, that it was not intended to save this Bond among other Securities ; the saving of which Securities will give a reasonable Interpretation to these Words in the Warrant of Attorney.

1811,
Jan. 23.

The Motion to dissolve the Injunction was renewed

Mr. Hart, Serjeant Palmer, and Mr. Heald, for the Plaintiff.

(*a*) Cited by the Lord Chancellor, *Ex parte Gifford.* 809, *Ante,* Vol. VI.

The

The Provision of this Warrant of Attorney, that it shall be without Prejudice to any Security the Defendant holds for the said Sum, or any Part thereof, is singular, if he is at Liberty to the Extent he contends. It is clearly decided, that a Discharge of the Principal by Contract discharges the Surety; and that Rule has never been controuled by such a general Reservation of Securities; which cannot have the Effect of saving the Right of the Creditor to proceed against the Surety, and by that Circuitry obtain Payment of the Debt, from which the principal Debtor was discharged. In *Burke's Case (a)*, mentioned by your Lordship, the saving in the Discharge had the Effect of leaving the Creditor at Liberty to proceed against the Surety: but that has no Application to a general Discharge of the principal Debtor by Agreement between him and the Creditor; to which the Surety was no Party; of which he had no Notice; who was treated as a Person entirely unconcerned and unconnected with the Transaction.

The Principle, resulting from *Ex parte Rushforth (b)*, is, that whatever Benefit is contracted for as between the principal Debtor and the Creditor is considered as contracted for on behalf of the Surety to the same Extent. This Creditor, contracting for farther Security, in addition to those he has, engaging not to proceed against the Debtor, and extending the Period of Payment by Instalments, must be understood as contracting not to take any Proceeding, that may meditately or immediately call upon the Debtor in any other Manner. The Alteration of the Time and Mode of Payment, to which the Creditor has consented, cannot have Effect; unless it extends to the Surety; who, if compelled by an Action to pay the Debt,

(a) Cited by the Lord Chancellor, *Ante*, Vol. VI. (b) *Ante*, Vol. X. 409.

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could immediately recover against the principal Debtor. That clearly could not be the Intention of these Parties : otherwise this Contract for additional Security can mean nothing : or rather would have the Effect of disabling the Debtor to pay the Debt ; the Discharge of which is his professed Object ; devesting out of him the Estate, which forms the Fund for Payment, without attaining that Object. Upon the Defendant's Construction of these Words he might the Day after this Transaction have arrested the principal Debtor upon the Bond. The Security is not in Substance prejudiced by this Delay of Payment. At least the Plaintiff ought not to be called upon, until the Principal has made Default in Payment of the Instalments.

*Burke's Case* is merely that of Two Sureties : One discharged by the Creditor, proceeding against the other ; who called upon the Court to consider him as discharged by the Act of the Creditor ; and he was discharged upon the Principle of *Nesbit v. Smith* (*a*), and *Rees v. Berrington* (*b*). In *Wright v. Simpson* (*c*) your Lordship lays down the Principle, that the Benefit, for which the Debtor contracts on his own Account, he contracts for on Account of the Surety ; and the Creditor is bound to the same Extent as to both. Wherever therefore the Principal gets Time, the Surety is entitled to the Benefit of it : else he is precluded from the common Equity of compelling the Principal to discharge him by paying the Debt. Another general Principle is, that the Surety is entitled to the Benefit of all Transactions between the Creditor and the principal Debtor. The Creditor is not bound to proceed ; but may remain passive : if however he does proceed, and afterwards gives Time, the Surety

(*a*) 2 Bro. C. C. 579.

(*c*) *Ante*, Vol. VI. 714.

(*b*) *Ante*, Vol. II. 540.

See 734.

must have the Benefit of that; as your Lordship states (*a*) in *Wright v. Simpson*.

1810-11.

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BOULTBEE

v.

STUBBS.

The Relief of the Surety is also supported by *English v. Darley* (*b*).

Sir Samuel Romilly, and Mr. Wingfield, for the Defendant.

All these Cases of Relief to the Surety have gone upon this; that Time was given to the Principal. In this Case Judgment being confessed under the Warrant of Attorney expressly without Prejudice to any Security the Creditor holds, the Surety sustains no Injury whatsoever. He might have called upon the Creditor to enforce his Demand against the principal Debtor equally after this Judgment confessed, as before. In all the Cases referred to the Creditor had put that out of his Power; and upon that alone the Surety was discharged. This Transaction, by which the Creditor obtains Part-payment, and a Mortgage, is highly advantageous to the Surety; relieving him in a very considerable Degree from his Obligation; leaving all the Remedies he could have called upon the Creditor to enforce against the principal Debtor still subsisting; and under these Circumstances, the Surety, sustaining no Delay or Injury, and having all the Benefit of this Transaction, claims in a Court of Equity to be wholly discharged upon the strict, technical, Rule, that Time, given to the Principal without Consent of the Surety, discharges the Surety. Your Lordship's Words in *Wright v. Simpson* are not to be understood, that, having brought an Action, the Plaintiff must proceed with the utmost Rigour; referring to the Decisions, establishing the Principles, that have been stated. In *Rees v. Berrington* this

(*a*) *Ante*, Vol. VI. 734.(*b*) 2 *Bos. & Pul.* 61.

Court

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~~  
BOULTBEE  
v.  
STUBBS.

Court would have enjoined the Creditor, proceeding upon the Bond, though at the Instance of the Surety. Is that the Case here? Would this Court have restrained a Proceeding upon the Bond against the express Contract, reserving the Right to proceed upon it notwithstanding the new Security; and no Time being given; by which the Surety could be affected either in Equity or at Law?

*The Lord CHANCELLOR.*

This Question is now presented to me in quite a new Point of View. Upon the former Occasion it was argued, as if the immediate Right of Action against *Thomas Boulbee*, the principal Debtor, was gone. It is clear, that, if he might have been forthwith sued, and Execution had against him, as the Fruit of that Suit, the Surety is not injured; and on the other Hand, that, in general, if Time is given to the Principal, the Surety is discharged. The Objection to the Reserve of Remedy against the Surety consists in the Interest the Principal has; that the Surety shall not be applied to. It is said, that the Principal cannot by Contract deprive himself of the Benefit, derived from that Forbearance; and there certainly have been Decisions, that, if Time is given to the Principal, reserving the Right to go against the Surety, the Principal cannot raise the Objection upon his Right to Time as against the Surety; as there is the Contract of the Principal, arising out of the Contract for Reserve against the Surety, that the latter, if the Creditor goes against him shall not be deprived of the Benefit of the Contract as against the Principal. That was *Burke's Case*; as to which I will look at the Note I have. If the Contract for Reserve against the Surety prevents his Remedy against the Principal, that Contract for Reserve will not do: but the Question is, whether it does in Law deprive the Surety of that Benefit. It may in many Cases be a very rational Provision, that the Principal shall have Time,

provided

provided he can have it without Prejudice to the Benefit of the Remedy against the Surety; which, though worth nothing at present, may in a Year's Time be very valuable; and the Creditor may very reasonably mean to secure the Benefit of that Contingency.

1810-11.  
~~.  
BOULTBEE  
v.  
STUBBS.

*The Lord Chancellor* granted the Injunction.

1811,  
April 11.

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DASHWOOD v. PEYTON.

1811,  
April 1, 2.  
May 2, 3. 6. 10.

SIR Thomas Peyton by his Will, dated the 14th of January, 1765, devised real Estates, and also the Advowson of Doddington, to the Use of his Nephew Henry Dashwood, afterwards Sir Henry Peyton, for Life, with Remainder to his first and other Sons in Tail Male, to the Plaintiff James Dashwood and his first and other Sons and several Remainders over; with the following Direction:

No Devise by Implication from the mere Recital of an erroneous Conception of Right.

" I do hereby order, will and direct, if the Living of Doddington in the Isle of Ely in the said County of Cambridge shall happen to become vacant by the Death or Resignation of the present Incumbent or otherwise while my said Nephew Henry Dashwood shall be in

As to an implied Election, the Will imposing an express Election in Favor of another Person, *Quare.*

of Resignation of a Living in Favor of a particular Person and not to accept a Bishopric, (the latter not directed by the Will), and whether to be considered upon the Principle of Marriage Brocage Bonds, as against public Policy, or as a corrupt Transaction, with reference to which the Court would not act, *Quare.*

" Possession

## CASES IN CHANCERY.

1811.  
~~  
DASHWOOD  
v.  
PEYTON.

" Possession of the Estates hereinbefore by me given or  
" limited to him as aforesaid, then and in such Case he  
" the said *Henry Dashwood* shall and do present his said  
" Brother *James Dashwood* to the said Living and Rec-  
" tory of *Doddington*."

At the Death of Sir *Thomas Peyton* the Living of *Doddington* was full: Dr. *Proby*, afterwards Dean of *Litchfield*, being the Incumbent. Sir *Henry Peyton*, being seised for his Life of the devised Estates and the Advowson, and being also seised of the other Estates in the County of *Suffolk*, which he had Power to dispose of, by his Will, dated the 10th of *January*, 1789, reciting, that he was seised or entitled for Life under the Will of his Uncle Sir *Thomas Peyton* among other Estates of or to the Advowson of the Rectory of *Doddington*, with Remainder to his eldest Son *Henry* in Tail Male, with divers Remainders over, " subject to a Direction in said Will, that my said Brother *James Dashwood* should be presented to said Rectory, when it shall next become vacant, which it is my Wish may be complied with, now I do hereby declare it to be my Desire and earnest Wish, that in case upon the Vacancy of the said Living by the Death or Promotion or Resignation or other Act of the present Incumbent the said *James Dashwood* shall not be then living, or shall decline to accept of the said Presentation, or in case the said Rectory shall again become vacant after the said *James Dashwood* shall have been presented to and accepted said Presentation, then and in either of such Events my said Son *Algernon Peyton* may be presented to said Rectory or Living of *Doddington* as soon as he shall be qualified and willing to accept of said Presentation; and that in order thereto in case at any Time after such Vacancy as is last hereinbefore mentioned and before my said Son *Algernon* shall be qualified and willing to accept

## CASES IN CHANCERY.

29

" accept of said Presentation the said Rectory shall be-  
" come vacant, such fit Person or Persons successively,  
" giving a Preference therein to my Nephews according  
" to their Seniorities, shall be presented to said Rectory  
" upon his or their executing a Bond in a sufficient Pe-  
" nalty for Resignation of said Rectory upon the Event  
" of my said Son *Algernon* being qualified and expres-  
" sing a Desire to accept of said Living."

1811.

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DASHWOOD

v.

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The Testator then gave and devised all his Freehold and Copyhold Estates in the County of *Suffolk* to his Wife for Life; and after her Decease to Sir *John Rous* and *John Heigham*, and their Heirs, upon Trust, that, in case the Testator's Son *Henry Peyton* shall as soon as conveniently may be after his attaining the Age of Twenty-one Years secure to or in Trust for the Testator's Son *Algernon Peyton* the Presentation of the said Rectory or Living "according to my Wish and Desire hereinbefore by this my Will expressed," then his said Trustees should convey the said Estates "unto my said eldest Son *Henry*, his Heirs and Assigns for ever: but if my said Son shall refuse or neglect to secure said Presentation to my said Son *Algernon* by the Space of Twelve Calendar Months next after he shall attain the Age of Twenty-one Years, and be thereunto required by the said Sir *John Rous* and *John Heigham* or the Survivor of them or his Heirs, and shall wilfully neglect to do any Act, by which Neglect the said *Algernon Peyton* shall be prevented from being presented to said Rectory or Living, or if my said Son *Henry* shall die without having so secured said Presentation," then upon Trust to convey the said Estates to *Algernon Peyton*, his Heirs and Assigns for ever, on his attaining the Age of Twenty-one Years.

By a Codicil, dated the 17th of January, 1789, with  
a similar

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a similar Recital, and that he had by his Will declared his Desire and earnest Wish, &c. (as stated in the Will with reference to the Living) the Testator declared, that, being desirous of expressing clearly and fully his Will and Desire with regard to said Preference to his said Nephews according to their Seniority, he desired, "that in case of "the last-mentioned Vacancy before my said Son *Algernon* shall be qualified to accept of said Presentation as aforesaid, my Nephew *John Heigham* shall be first offered said Presentation to said Rectory or Living; "and in case of his Death or of his Refusal or Neglect "by the Space of Twenty-one Days to execute such Bond of Resignation as aforesaid, then and in such Case my Nephew *Henry Heigham* may be then offered said Presentation" and in case of his Death or Refusal or Neglect for the Space of Twenty-one Days, "my Nephew *George Heigham*;" and in case of his Death or of his Refusal or Neglect by the like Space of Twenty-one Days to execute such Bond of Resignation as aforesaid, then that some other fit Person or Persons may be successively offered said Presentation in the mean Time and until my said Son *Algernon* shall be qualified and willing to accept said Presentation: every such Person previously to his being presented to said Living executing such Bond of Resignation as aforesaid; and I do hereby declare it to be my Will and direct, that such Bond of Resignation as aforesaid, shall be in Trust for and for the sole Use and Benefit of my said Son *Algernon Peyton*."

Sir *Henry Peyton* died in *March, 1789*; leaving his Two Sons *Henry* and *Algernon* surviving. Sir *Henry Peyton*, the eldest Son, having attained Twenty-one, by Indenture, dated the 15th of *December, 1802*, demised and granted the Advowson to Lord *Rous*, his Executors, &c. for the Term of Ninety-nine Years, if *Algernon Peyton*

ton should so long live, for the Purpose of enabling them to present *Algernon Peyton* to the Living; and to entitle Sir *Henry Peyton* to a Conveyance of the Estates in the County of *Suffolk*; and Lord *Rous* conveyed the *Suffolk* Estates to the Use of Sir *Henry Peyton* and his Heirs.

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Dr. *Proby* continued the Incumbent until his Death in *January*, 1807; having been the Rector Fifty-seven Years. *Algernon Peyton* was then of the Age of Twenty-one Years. By a Letter to the Plaintiff *James Dashwood*, dated the 23d of *January*, 1807, Lord *Rous*, the Trustee, stated, that Sir *Henry Peyton* was anxious to comply with his Father's Will; and at the same Time to guard against a Forfeiture of the *Suffolk* Estate to his Brother *Algernon*; to which Sir *Henry* was liable, if he did not within Twelve Months after he came of Age secure to *Algernon* the Presentation as soon as he should be capable of holding it; that a Deed of Trust had been prepared accordingly; vesting the Living in Lord *Rous*, as Trustee, to present *Algernon*; if the Dean had lived, until *Algernon* attained Twenty-four; and in case of the earlier Death of the Incumbent to give the Refusal of it to the Plaintiff; to hold under a Bond of Resignation and an Agreement not to accept a Bishopric, until *Algernon* should be capable of taking it; if the Plaintiff should decline for Twenty-one Days to accept it upon those Terms, then to be offered to Mr. *Heigham*; and in case of his Refusal for Twenty-one Days some other fit Person to be found, to hold it; and recommending the Plaintiff to take it.

The Bill stated, that at the Time of receiving the Letter from Lord *Rous* the Plaintiff was ignorant of the Contents of the Wills of Sir *Thomas* and Sir *Henry Peyton*; or that it was competent to Sir *Henry Peyton*, the Son, or the Trustees to have secured the next Presentation to the Plaintiff for his Life in preference to *Algernon Peyton* without

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without requiring any Bond, obliging the Plaintiff to resign in Favor of *Algernon Peyton* on his becoming qualified to hold the Living; and the Plaintiff under such Ignorance and in reliance on the Representations, so made to him by Lord *Rous*, expressed his Willingness to accept the Presentation on the Terms proposed. Accordingly a Bond was executed in *February*, 1807, by the Plaintiff; reciting the Demise of the Advowson in 1802 by Sir *Henry Peyton* to Lord *Rous* for Ninety-nine Years, and the Vacancy, &c.; with Condition, that, if *James Dashwood* shall not after his Admission, Institution, &c., upon the Presentation of Lord *Rous* accept a Bishopric, and also, if, when *Algernon Peyton* shall be in Holy Orders, and duly qualified and willing to be presented, &c. *James Dashwood* shall within One Month after Request resign, or if *Algernon Peyton* shall die without being qualified and willing, &c., the Bond shall be void.

The Bill farther stated, that the Plaintiff, who was soon afterwards presented, under the same Mistake wrote to the Bishop; intimating his Intention to resign conformably to this Bond; and afterwards discovered, that it was intended by both Testators, that he should be presented without any such Obligation; and the Bill prayed, that the Defendant Lord *Rous* may be decreed to deliver up the Bond to be cancelled, and an Injunction against proceeding upon it.

The Answers, admitting the Facts, submitted, that it was incumbent upon Sir *Henry Peyton*, in order to entitle himself to a Conveyance of the *Suffolk Estate*, to demise the Rectory so that the Plaintiff, if he accepted the Presentation, should be under an Obligation to resign, according to the Condition of the Bond; that by Sir *Henry Peyton's* Will the Defendant Sir *Henry Peyton* was not authorized to demise the Rectory in Trust to present the Plaintiff;

Plaintiff, and upon his Death *Algernon Peyton*, if qualified; and, if not, some other Person, who should give a Bond, &c. that though it is not expressly required by the Will or Codicil of Sir *Henry Peyton*; that any Bond should be required from the Plaintiff; yet under the Circumstances it was proper and necessary: the Plaintiff being entitled to the Presentation in the Event only of Dr. *Proby's* Death in the Life of the Testator Sir *Henry Peyton*, or while he was in Possession of the Estates, devised to him; that it was not his Intention, that the Plaintiff should be presented without any Restraint, &c., or except in the Event of a Vacancy in the Life of Sir *Henry Peyton*, the Testator, or while he was in Possession of the Estates, devised to him by Sir *Thomas Peyton*.

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Sir Samuel Romilly, Mr. Hollist, Mr. Hart, and Mr. Roupell, in support of the Motion for an Injunction.

This Relief is sought upon Two Grounds: first, that the Plaintiff, when he gave this Bond, was not aware of his Right: secondly, that the Bond is against public Policy.

In the only Two Cases, which have occurred since *The Bishop of London v. Fytche* (a), the final Decision of which in the House of Lords was against the Validity of a general Bond of Resignation, the Court of King's Bench has certainly shewn a strong Inclination not to extend that; and to admit Distinctions: but there is much more Objection to this Bond; which includes farther an Obligation not to accept a Bishopric; in Effect an Undertaking to pay a Sum of Money, when the Obligor shall

(a) 1 Bro. C.C. 96. In *Simony. Bagshaw v. Bossley*, the House of Lords, May 30, 4 Term Rep. 78. *Partridge* 1783. *Cunningham's Law of v. Whiston*, 4 Term Rep. 359.

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be promoted to a See: an Attempt by thus defeating the King's Right to appoint to the Benefice, vacated by that Promotion, to impose Restraint upon the Exercise of that Branch of the Prerogative, by which His Majesty controuls the Appointment to that important Trust; involving Duties, the proper Discharge of which is of the most essential Importance to the Public. Upon these Grounds a Court of Equity will not permit this Bond to have Effect; if it could be enforced at Law; and upon such Subjects, though there might be a Defence at Law, there is a concurrent Jurisdiction: *Hanington v. Du Chatel* (a).

The Plaintiff takes under the Will by Implication, as in the Cases of *Roe* on the Demise of *Randale v. Somerset* (b). *Bibin v. Walker* (c), and *Poulson v. Wellington* (d). In the last a mere Recital of the Consequence, if no Appointment should be made, was held a sufficient Indication of the Intention to give the Subject. There is no Direction, that a Bond shall be taken from the Plaintiff. That is confined to the *Heighams*, or the other Person, to be presented in the Interval. The Plaintiff, entitled to be presented, free from any Obligation, was induced to give the Bond under a direct Misrepresentation by the Letter of the Trustee, that there was no Alternative; that they were bound to require a Bond, not only for Resignation, but also not to accept a Bishopric. With this clear Implication the Will of Sir *Henry Peyton* imposes a Case of Election on his eldest Son by a Forfeiture of the devised Estates, if he should not secure the Presentation of *Algernon Peyton* to the Living; and by taking the *Suffolk* Estate the eldest Son made his Election; and must comply with all the Terms.

(a) 1 Bro. C. C. 124.

(c) Amb. 661.

(b) 2 Black. 692. 5 Bur.

(d) 2 P. W. 533.

2608.

Sir

Sir Arthur Piggott, Mr. Richards, and Mr. Johnson,
for the Defendants.

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The Plaintiff has no Claim under the Will of Sir *Thomas Peyton*: the Event described by that Will not having happened. Upon the Will of Sir *Henry Peyton* it is impossible to raise a Case of Election, or by any fair Construction to say, that the Testator has given the first Presentation of this Living to the Plaintiff. Upon the Form of the Trust, as it appears in the Will and Codicil, it is consistent to suppose, that the Testator acted under a false Impression, that his Uncle had put the Presentation out of his Controul; and, supposing the Plaintiff thus provided for, he proceeds to his own Objects. Who can say, that, independent of that Mistake his Intention was to give this Living to his Brother? No such Intention is to be collected from the Will; and a Court of Justice cannot venture thus to make a Will for him; by Implication merely from that Mistake inferring an Intention to give; raising a Case of Election.

Sir Samuel Romilly, in Reply.

There is no such Distinction, that there may not be a Devise by Implication, when it is to be made effectual upon the Doctrine of Election, farther than that the Presumption is against the Intention to dispose of the Property of another: but, if a necessary Implication appears in a Will to operate upon Property, which is not the Testator's, the Effect through the Medium of Election is the same as a Disposition of his own Property. The Doctrine of Election is no more than this: if the Court sees clearly the Intention to dispose of the Property of another, to whom something is given by the Will, he must, if he will take the Bounty, comply with the

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Condition by giving up his own Property (*a*). The Question is merely upon the Intention : did the Party mean to dispose of the Property, which was not his ? If that Intention appears by necessary Implication, the Effect is the same as if expressed in Terms. In this Will such Intention appears very clear, by the Means, adopted for securing the Presentation of *Algernon*, providing indirectly for that of the Plaintiff also. Seeing that Intention so to dispose of this Property the Court must have Recourse to the general Principle, on which the Doctrine of Election stands ; and the Effect is exactly the same as if this was Property, over which the Testator had compleat Dominion.

The Lord CHANCELLOR.

This Motion is made under very particular Circumstances ; and though I should have wished, before I decided, to look into the Authorities upon the Doctrine as to the Effect of Recital, founded in Mistake, with or without Words denoting Wish, yet with reference to the Nature of the Property I think it better not to delay the Determination.

Independent of the Circumstances, arising out of the Will, this is the Case of a Presentation of a Person, who upon that Presentation has given a Bond of Resignation in Favor of a particular Individual and a Bond never to accept a Bishopric ; and, supposing the Case had brought forward more distinctly the Objection, the Ground of it is to be considered in different Views.

In the Case of *The Bishop of London v. Fytche* (*b*),

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| (<i>a</i>) See the last Case of
Election, <i>Thellusson v. Wood-</i>
<i>ford, Ante</i> , Vol. XIII, 209, | and the References. |
| | (<i>b</i>) 1 Bro. C. C. 96. <i>Cun-</i>
<i>ningham's Law of Simony.</i> |

the

the House of Lords held, that a general Bond of Resignation is bad. That Case was not followed in the Court of King's Bench with reference to a Bond to resign in Favor of a particular Individual, the Son or Nephew of the Person, to whom that Obligation was made. In that Case it was said to have been repeatedly decided at Law, that a general Bond of Resignation is good; but I believe it will be found, that the *Lord Chancellor*, or that Judge, who against the Opinion of the other Judges held a general Bond of Resignation to be positively bad, denied, that such Bond had been held good in any Instance; and stated, that a Search would produce that Result. It is very difficult also upon the Pleadings in *The Bishop of London v. Fytche* (a) to reconcile the Distinction between general and particular Bonds of Resignation with the Principle, on which the House of Lords made that Decision. It would not however become me, having regard to what is the present State of the Law on this Subject, to interpose in a Court of Equity on the Ground, that this is a particular Bond of Resignation; as, though I agree, that this Court, if, it has a concurrent Jurisdiction, is not bound to wait for the Decision of a Court of Law, yet reasonable Caution requires a Court of Equity not hastily to pronounce bad a Bond, understood to be good at Law; and it would at least be proper to leave that Question to be reconsidered at Law.

I make this Observation with another View. If the particular Bond is bad, it is so either from Motives of public Policy, or as being understood to be bad either by Statute or the Common Law. Admitting the Cases of Relief, afforded to a *Particeps Criminis*, there is considerable Doubt, upon Grounds of public Policy, whether it is possible for a Clergyman to come here, stating, that

(a) 1 Bro. C. C. 96. Cunningham's Law of Simony.

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he had given a general, or particular, Bond of Resignation, and on the Ground, that such Bond was bad, calling on the Court to enable him to hold the Living, discharged of the Obligation under the Bond. In the Case of *The Bishop of London v. Fytche* the Living and the Bond went together: the Clergyman lost his Living; and his Bond was held good for nothing: in other Cases the Ground of Relief was, that a bad and vicious Use was made of the Bond: but I doubt, whether this is a proper Ground of Relief; and with regard to the other Ground of public Policy, the Engagement not to accept a Bishopric, that, if a Ground in Equity, is equally so at Law. I admit the concurrent Jurisdiction: but, knowing, that there are in Fact many such Bonds, I should wish to receive Information as to the Law on that Head, before I set aside this Bond in Equity on that Ground; being extremely unwilling to interpose against that, which in Habit and Practice, it is notorious, very constantly takes place.

Supposing the Court cannot interpose on either of those Grounds, another Ground is taken by the Plaintiff; not disputing the Legality of the particular Bond, and his Engagement not to accept a Bishopric, he insists upon his Right to have this Living, as an Interest by Devise, standing upon Implication, or the Doctrine of Election, given to him purely and without Condition; that Terms are imposed on him, which ought not to be imposed; that the Nature of the Transaction was not Dealing, Treaty, and Bargain; but it is a Transaction, in which to a Man, having the Right, though not aware of it, this Presentation was held out as a Favor; and with that Conception, that there was no Right, or Demand, under that common Mistake, the Presentation was clogged with a Condition, obliging him to give up the Living; whereas he ought to have it, as all Benefices are by the Policy of the Law held,

held, by a Tenure for Life. Both Parties, the Person presenting, and he, who was presented, had, I believe upon the whole, a very honorable Purpose; and I see it in no other View than that these Conditions should not be operative, if *James Dashwood* had a Right to be presented.

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The Question then is, whether he had that Right; depending upon a very singular State of Circumstances. Upon the first of these Wills it is impossible to contend, that *James* had any Right to the Presentation; unless the Vacancy occurred during the Life of *Henry*; and while he was in Possession of the devised Estates. Upon the Will of Sir *Henry*, and the Codicil, it is clear, that the Tenant in Tail of the Advowson of *Doddington* had made a Conveyance of it, amounting to this; that the Trustees should upon a Vacancy present *James Dashwood*, if he thought proper to accept it; and upon his Death should present *Algernon*, if he was Twenty-four Years of Age; or, if not, that they should present the *Heighams* successively in their Order; and it appears to me, that they could not have complained of the Trust, interposed in Favor of *James Dashwood*: nor could *Algernon Peyton* have complained of it.

The Circumstance, that a Condition is expressed with reference to One Individual and not the other, is not sufficient Proof, that there was no Intention to raise a Case of Election; and, if a Case of Election is raised by the Operation of this Will, notwithstanding the express Condition as to the *Suffolk* Estate, yet, if any other Property was given to *Henry*, upon which Election can be fastened, the Court will apply it without any express Direction, and though there is an express Direction with regard to another Individual: a Circumstance however, which will make the Court consider, whether the true

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Construction is not, that the Testator expressly imposed a Condition on one, conceiving it to be a Gift to him ; and did not impose a Condition on the other as understanding, not that he took a Gift, but that he was already in Possession by some antecedent Title.

It was contended justly, that *James Dashwood* must succeed by some Title, legal or equitable, in himself; and my Opinion is, that *Algernon* could not have come here, while under the Age of Twenty-four; insisting upon his Brother *Henry*'s making any Conveyance to exclude *James Dashwood*. *Henry* might have said, it was immaterial to him, whether the Testator expressed himself by Mistake; but the Conveyance to *Algernon* of the Living, after *James* had possessed it, would satisfy the Terms of the Will. So the *Heighams*, who might, I think, have claimed free from this Condition as to the Bishopric, could not have called on *Henry* for the Presentation, until *James* had refused, or a Vacancy occurred after his Possession.

The true Question is, whether, if *Henry* chose to satisfy the Claims of those Persons, passing over *James Dashwood*, he had an Interest, that would in Equity support his Claim to be relieved against that Act. That cannot be upon the Ground of a Devise by Implication; which strictly arises, where the Devisor, meaning to part with his Interest, parts expressly with a Portion of it only; and the Question is, whether that, which is not in Terms given, is by the Effect of the Will, taken altogether, disposed of.

Devise to *B.* after the Death of *A.*

B. being the Heir at Law, a necessary Implication for *A.* for Life.

Where, for Instance, an Estate is given to *B.* after the Death of *A.* the Question is, what is done with it, or whether any thing is meant to be done with it, during *A.*'s Life. If *B.* is the Heir at Law, of Necessity *A.* must take the intermediate Interest; though not disposed of; as the Heir at Law cannot take during the Life of *A.*

So,

So, as to precatory Words ; which in Equity have been held imperative, where the Object and Subject are certain : those are Cases of Trust, raised either out of the Disposition of an Interest, or out of what amounts to a Direction to elect. Where, for Instance, personal Property is given to a Person for ever ; with Words of Request to that Person to give upon his Death definite, ascertained, Parts to definite, ascertained, Objects; a Trust arises; as it is declared, what is to be given; and to whom; which however may be considered rather a strong Decision. So, if personal or real Estate is given to *A.*; with an Expression of Hope and Trust, that he will give at his Death Property of his own to *B.* that is an imperative Trust upon express Condition.

The real Question is, whether this is to be considered as a Case of Election ; and though it cannot be a direct Devise, as the Testator had nothing to give, it is clear, raising a Case that an effectual Gift may be made by raising a Case of Election : but for that Purpose a clear Intention to give that, which is not his Property, is always required. If therefore it can be established, that the Testator has expressly declared, or has shewn a clear Intention, that *James Dashwood* should take this Presentation, a Case of Election would be raised: but if upon the whole Will, taken together, it is obvious, that the Testator thought he had nothing to give to *James*, that he was already entitled, and the Testator under that Supposition has not given to him, or expressed an Intention, that he should take, I find no Authority for holding mere Recital, without more, to amount to Gift, or Demonstration of an Intention to give.

Upon the whole of this Case, admitting, that, if there was either direct Gift, or, what amounts to it, Intention to give what was not the Testator's Property, the Condition, expressed

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perative, where
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expressed as to *Algernon*, would not preclude the Application of the same Doctrine of Election as to *James Dashwood*, yet the Expression of that Condition shews an Anxiety to secure what he intended to give ; accounting for the Absence of it as to that, which he did not conceive was his to give ; and upon the whole Will, though, I think, *Algernon* might have insisted under the Age of Twenty-four, that he should not be disappointed by giving this Living to any other Person than *James Dashwood*, that, was a Question between *Algernon* and *Henry*, the *Heighams* and *Henry*, and the *Hyams* and *Algernon* ; and by Mistake *James Dashwood* has not derived such an Interest in the Property, that he could insist upon. The Question, whether it was lawful to clog the Presentation to him with these Conditions, I shall not deal with in this Court.

As this Motion will probably have the Effect of a Hearing, you may, if you think proper, bring under the Review of the Court the Order for dissolving the Injunction.

The Motion was again argued ; and after the Argument the *Lord Chancellor* mentioned the Case of *Tilly v. Tilly* from Mr. Joddrell's Notes ; where, the Owner in Fee of a Trust Estate, reciting, that his Wife was entitled to Dower out of that Estate, devised it ; and that Recital was held to amount to a Devise to her of a third Part of the Rents and Profits.

The Lord CHANCELLOR.

May 10. I am indebted to Mr. Hollist's Industry and Kindness
 for

for a very correct Note of the Case of *Tilly v. Tilly* (a): an important Authority; and the only one, that seems to have much Relation to this Subject; and I have in Mr. Joddrell's Note Book what the *Lord Chancellor* is reported to have said; which I take to be copied from Mr. *Forster*.

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Lancelot Tolson Tilly was entitled in the Event of attaining the Age of Twenty-three to a Conveyance of real Estates in Fee-simple; which in the Event of his Death under that Age were devised to the Defendant *Simpson*, and his Heirs. *Tilly* in 1733 at the Age of Eighteen married the Plaintiff. Supposing, that she would be entitled to Dower, in case he should live to attain Twenty-three, which would be correct, if the Trustees had made the Conveyance, he by his Will made a Provision for her in the Alternative of his Death under Twenty-three: the Case, in which she would not have been entitled to Dower. When he re-published his Will, he was above the Age of Twenty-three. The Will was therefore to be considered as speaking, after he had become entitled to a Conveyance: entitled therefore to call for the legal Estate; but not having it: his Wife therefore not entitled to Dower: but it appeared upon the Will, that he conceived her to be entitled. The Question therefore was, whether those, who were to take under his Will, could contest with her the Propriety of that Conception. The Court was struck with the Hardship; and it is perhaps rather difficult to reconcile what the *Lord Chancellor* said with sound Principle.

The Note states, that the *Lord Chancellor* declared it was a very hard Case upon the Plaintiff; that the Court had gone a great Way in considering Declarations of

(a) Reg. Book, Fol. 577, July 13th, 1743.

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Intent by Recital as Devise: therefore, as the Daughter was an Infant, he would without making any Precedent decree a Third of the Rents to the Plaintiff; and leave the Infant to shew Cause, when of Age.

With all Deference to that great Judge I must say, that is not the Way, in which the Court should express its Opinion: the Authority is weakened by such Expressions; and it was difficult to make the Decree, that appears to have been made, without more Hazard of forming a Precedent than the *Lord Chancellor* seems to apprehend. It is obvious however, that though the Court had a strong Inclination, that the Widow should have this Provision, (and a Case of greater Hardship could not be presented) his Lordship does not seem to hold out his Decision as a very high Authority. The Decree certainly declares, that it appeared to have been the Opinion and Intention of the Plaintiff's Husband by the Expressions of his Will, that she should have her Dower of such Part of the Trust Estates, to which he would have been entitled in Fee, in case he lived to the Age of Twenty-three; and that the Defendants ought not to be permitted to take the Benefit of the DeVises and Bequests to them and at the same Time frustrate the Testator's Intention with regard to Dower; and an Account was decreed accordingly; a Day being given, as it must of Necessity, to the Infant to shew Cause. As against the Infant therefore this Decree cannot be considered as establishing a Case of Election upon the Declaration of Intention by Recital in the Will; and the Person, entitled next in Remainder, who was adult, appears to have submitted. This is a correct Account of the Case of *Tilly v. Tilly*.

. There was in this Case considerable Controversy upon the Point, whether *James Dashwood* did, or did not, know the Effect of *Sir Thomas Peyton's* Will; and, as clearly

clearly *Henry Peyton*, the Tenant for Life, was not acquainted with it, I may fairly assume *James Dashwood's* Ignorance; and that there might be a common Mistake. After the Death of Sir *Henry Peyton*, upon whose Will this Question arises, the present Sir *Henry Peyton* became entitled as Tenant in Tail of the Manor and Right of Presentation, and unquestionably under no legal Title to present *James Dashwood*: but Sir *Henry*, the Testator, having a Conception, that *James Dashwood* had some Interest, and being determined to give an Interest to his younger Son *Algernon*, made Provision by his Will with regard to the *Suffolk* Estate; which led to the Advice, taken as to the Act to be done, to secure to Sir *Henry Peyton* the Benefit of the *Suffolk* Estate; securing also the Presentation to *Algernon*; and the Result was an Opinion, upon Consideration of both Wills, that Sir *Henry Peyton* was under no Obligation to present *James Dashwood*; that, whatever Act might be necessary with regard to *Algernon*, to make good Sir *Henry Peyton's* Title to the *Suffolk* Estate, *James Dashwood* had no Right to call upon him to do any thing; and upon the Deed his Determination is clear to give the Living to *James Dashwood*, as Matter, not of Right, but of Favor; on account of their Connection; and with the farther View of securing to himself the *Suffolk* Estate by securing to *Algernon* the Living, when, having attained the Age of Twenty-four, he should be capable of taking it. Sir *Henry Peyton* therefore, executing the Demise in Trust to present *James Dashwood*, cannot be represented as having made an Election to take under the Will of Sir *Thomas Peyton*; and if the Will of the late Sir *Henry Peyton* raised a Case of Election, and the Construction put upon that Will is right, an Instrument, that does not execute the Intention, attributed to that Will, cannot be considered an Election to take under it.

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it. The Election therefore, if there is a Case for it, is still open.

From the Correspondence Lord Rous appears to have conceived, that by the Terms of these Wills James Dashwood, if presented, must give a Bond of Resignation; and I will presume, that he took the Presentation under a Belief on his Part, (to state it as high as I can), that he was to give a Bond. The Mistake was not unnatural; and I do not believe, he had a Notion at the Time, that he had a Right. If he had, there is enough of Mistake and Surprize to afford a Ground for Relief: but there is no Reason to conclude, that Sir Henry Peyton meant to give him a Right: on the contrary Sir Henry Peyton acted on the Supposition, that there was no such Right.

Under these Circumstances the Question naturally arose as to the Effect of a Bond of Resignation, general, or in Favor of a particular Person; and I do not see, how I could possibly interpose to relieve merely on the Ground, that such Bond was given. Whether he understood, or fancied, that he had the Right without giving a Bond, or not, he has given it; and Two Principles oppose his Claim to be relieved against it. If, as the Court of King's Bench held, a Bond to resign in Favor of a particular Person, is good, as not being precisely the same as that, which in the Case of *The Bishop of London v. Fytche* (a) was held bad in the House of Lords, on that Ground there can be no Relief against it: if it falls within the Principle, on which the Bond was in that Case determined to be bad, the Plaintiff claims Relief against an Act, with reference to which this Court would not stir: not, as in the Case of Marriage-Brocage, bad upon Grounds of Policy, and therefore admitting Relief; but

(a) 1 Bro. C. C. 96. Cunningham's Law of Simony.

bad,

bad, as being a corrupt Transaction : the Party therefore not coming with clean Hands, entitling him to Relief. Upon that Question I give no Opinion ; as, if it is to be decided, the Opinion of a Court of Law must be had upon it ; and therefore there is no Reason to grant an Injunction against an Action on the Bond.

This Bill however does not state that Case ; contending that the Plaintiff under the Will of Sir *Thomas Peyton* has no Title ; nor any legal Title under that of Sir *Henry Peyton* ; but that he has under the latter Will an equitable Title ; (and, as I must suppose him to say, to this Presentation) ; a Case of Election being very different from a Title to the Thing itself. Having this equitable Title to the Presentation under the Effect of the whole Transaction, in the Course of which this Bond was given, he proposes a Case of Surprise in this Respect ; that the Parties intended to give him that, to which they understood him to be entitled : a Presentation according to his Right ; that he proposed so to accept ; that they have not given, and he has not accepted, a Presentation according to his Right ; that all were involved in one common Mistake ; and the Court must regard the Presentation as made according to his Right : viz. subject to no Condition of Resignation ; that it is therefore against Conscience to sue upon the Bond at Law ; and consequently the Injunction should be granted.

The Proposition, that the Presentation was made under a common Mistake, requires the Plaintiff to establish, that Sir *Henry Peyton* meant to give some Title, which he had under the Will of the late Sir *Henry* ; which it is impossible to make out. The present Sir *Henry's* View of it was, that, he did not, whatever Wish he might have had in *James Dashwood's* Favor, conceive him to be entitled to the Presentation.

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Devise to the Heir after the Death of the Devisor's Wife: a necessary Implication, that the Wife shall take for Life: but no Implication for her upon such a Devise of another Man's Estate through the Medium of Election.

The Plaintiff must then take it in another Point of View; and contend, that he is entitled to the Presentation, free from all Condition, upon the legal and equitable Effect of the Two Wills, taken together; and therefore he had the Title, subject to no Condition, that could be enforced by Suit; whether intended by Sir *Henry*, or not; and the Effect of their Mistake is, that the Plaintiff has a Right to the Living, discharged from the Bond. In all the Cases stated of Devises by Implication, the Party, upon whose Will the Question arose, had the Estate to give by the Effect of his own Will. That certainly makes some Difference. A Devise to the Heir at Law of the Devisor after the Death of his Wife raises a necessary Implication, that the Wife shall take for her Life; as the Estate must go to some One in the Interval: but from the Devise by one Man of another Man's Estate after the Death of the Devisor's Wife there is no Implication in her Favor. Admitting however, that upon a similar Construction of the Will, as furnishing Implication, a Case of Election may be raised, the Question is, whether Sir *Henry* did mean to raise that Case; and, if he did, whether the Consequence, taking the whole Will together, is, that the Plaintiff can insist upon having this Living; or must be satisfied in Equity by the Benefit, which results from the Application of the Doctrine of Election; and with regard to both these Considerations this Will appears extremely peculiar. The Expression of his Intention as to the Living in Favor of *Algernon*, whose Title to take it he seems to think depending entirely upon his Expression of Intention, is by the Alternative as to the *Suffolk* Estate: "if you give the Living to *Algernon*, you shall have the *Suffolk* Estate: if not, he shall have it." Conceiving, that the Plaintiff was entitled to this Living, not in consequence of his (the Testator's) Expression of Intention, he does not by conditional Expressions seek to enforce Compliance with the Will of another Person.

With

With regard to the Doctrine of Election, *Algernon*, if the Vacancy had happened, when he was Twenty-one, might have desired to have his Uncle *James* presented without a Bond, in preference to any one else with one; and there is nothing in the Will, obliging any one to give a Bond not to accept a Bishoprick. As far as the Doctrine of Election is to be enforced as to the *Suffolk Estate*, if *Algernon* did not complain, the Plaintiff could not: he cannot, I think, work out a Case of Election by the *Suffolk Estate*; and I strongly incline to the Opinion, that he cannot by another Estate, which the Defendant takes in Fee, raise a Case of Election, though not in Terms expressed, by Implication upon the general Doctrine of the Court. That however is the utmost he could do; and, where a Case of Election is raised, it does not give a Right to retain the Thing itself; though it may give a Right to Compensation out of something else.

The Conclusion is, that I cannot grant an Injunction: but the Refusal of it is altogether without Prejudice to any Question upon the Case of Election; if the Plaintiff chooses to carry on the Suit.

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Principle of
Election; giving a Right, not
to the Thing
itself, but to
Compensation
out of some-
thing else.

BAILEY v. WRIGHT.

ROLLS.
1811,
March 19. 21.

BY a Settlement, executed on the Marriage of the Plaintiff *Samuel Bailey* and *Miriam Orrell* in 1794, a Sum of £700, the Fortune of the Wife, was settled, in Trust as to £500 to place the same out at Interest, and property, in Default of her Appointment, for her next of Kin or personal Representative, the Husband not entitled.

Under a Li-
mitation in a
Marriage Set-
tlement of the
Wife's Pro-

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to pay the yearly Interest, &c., to *Miriam Orrell*, the Wife, for her separate Use during their joint Lives; and in case she should survive, to pay the Principal to her: but in case she should happen to die in the Life of her Husband, then to pay the said principal Sum of £500 according to her Appointment by any Writing under her Hand and Seal, or by Will, and, in Default of such Appointment, in Trust for the next of Kin or personal Representatives of the said *Miriam Orrell*; and upon farther Trust to place out at Interest the remaining £200 to the Plaintiff during his Life upon his Bond, and to pay the Interest thereof to him, or to permit him to retain the same, during his Life, and in case he should die in her Life to pay the Principal to her, but, if he should survive, then according to her Appointment, &c., and, in Default of Appointment, in Trust for the next of Kin or personal Representative of the said *Miriam Orrell*. No Property of the Husband was settled. The Wife being dead without Issue and without Appointment, the Bill was filed by the Husband, claiming under the ultimate Limitation against the Sister of his Wife.

Mr. Hall, for the Plaintiff.

The first Consideration is, whether these Words are to be taken as Words of Limitation, making the Party take as a Purchaser against the Course of Succession, prescribed by the Law; or in the Construction of this Settlement they mean any thing more than the Death of the Wife intestate; pointing out, to whom the Property should go in the Case of Intestacy; as the Words "next Heir" do not give any particular Individual a Title to take real Estate, as a Purchaser; but merely denote the Devolution by Course of Law. That is the whole Effect of the Words, as used in this Settlement. The apparent Tendency of some modern Opinions to consider Husband and Wife

Wife as in no Respect of Kin, or related to each other, either during or after the Coverture, cannot prevail against the uniform Series of ancient Authorities: *Bracton* (a), *Glanville* (b), and *Littleton* (c), treating them, not merely as in the nearest Degree related, but as forming one Person: “*Unica Persona, curo Una & Sanguis Unus,*” are the strong Terms, by which their Connection is on that Foundation described. Lord *Macclesfield*, Lord *Hardwicke*, Lord *Thurlow*, and the Court of King’s Bench, have expressly stated the Husband to be next of Kin to his Wife. By the Statute of Distribution (d) and the Statute of Henry 8 (e) the Wife, being distinguished from the next of Kin, shall not take in that Character: but the Husband has been held within the Equity of the Statute of Henry 8 entitled to take out Administration to her; which could be only as next of Kin. The Statute of Distributions, not pointing to the Relation of Husband and Wife upon the Death of the Wife intestate, and, the Statute of Frauds (f), declaring, that nothing in the former Act shall extend to *Femmes Covert*, that shall die intestate, but that their Husbands may demand and have Administration of their personal Estates, and recover and enjoy the same as they might have done before the said Act, have no Effect whatsoever. Upon various Authorities the Effect of the Relation continues after Dissolution of the Marriage: the Husband has Administration to his Wife, not by virtue of the marital Right, but as next of Kin: *The King v. Dr. Bette-*

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| (a) <i>Bract.</i> Lib. 2. c. 5.<br>Sec. 5. Fol. 12. Lib. 5. Tracts<br>5. c. 25. Sec. 10. Fol. 429. | (c) Sec. 291.<br>(d) Stat. 22 & 23 Ch. 2.<br>c. 10.     |
| (b) <i>Glanv.</i> Lib. 14. c. 3.<br>Fol. 115. Mr. Beames’s<br>Translation, 356.                    | (e) Stat. 21 Hen. 8. c. 5.<br>(f) Stat. 29 Ch. 2. c. 3. |

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worth (a): *Cart v. Rees* mentioned in *Squib v. Wigan* (b): *Elliot v. Collier* (c); and *Fettiplace v. Gorges* (d); where Lord *Thurlow* expresses that Opinion in Terms. In *Siderfin* (e) the Reason is given: no other being in *aequali gradu*. In *Humphrey v. Bullen* (f) Lord *Hardwicke*, adopting the Language of the Statute (g) of *Edward 3.* says, “ During the Coverture they are but one Person: “ but when the Coverture is dissolved by the Death of “ the Wife, the Husband is certainly the next Friend and “ nearest Relation; and has a Right to administer ex-“ clusive of all other Persons.”

The Judgment of Lord *Loughborough* in the Case of *Watt v. Watt* (h) does not clash with these Authorities: the Words “ of her own Family,” added to the Description of “ next of Kin” of the Wife, excluding the Husband. In *Griffin v. Nanson* (i) Lord *Alvanley* had no Conception, that, if the Settlor had married, his Widow would not have been entitled under the Description of next of Kin; though the Cases of Husband and Wife are very different with regard to this Question. In the late Case, *Nicholls v. Savage* (k), the Widow was held not entitled under the Description of next of Kin, that would have been entitled to the personal Estate under the Statute, in case he had died intestate: a Decision, not to be disputed: the Widow and next of Kin being by the Statute put in Opposition. The *Lord Chancellor* made a similar Decision in *Garrick v. Lord Camden* (l).

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| (a) 2 Str. 1111. | (g) Stat. 31 Edw. 3. c. 11. |
| “ (b) 1 P. Will. 381. | (h) <i>Ante</i> , Vol. III. 244. |
| (c) 1 Ves. 15. 3 Atk. 526. | (i) <i>Ante</i> , Vol. IV. 344. |
| 1 Wilts. 168. | (k) At the <i>Rolls</i> , 5th |
| (d) 3 Bro. C.C. 8. <i>Ante</i> , Vol. I. 46. | March, 1810: cited from a Manuscript Note of Mr. <i>Wetherell</i> . |
| (e) Sid 409. | |
| “ (f) 1 Atk. 458. | (l) <i>Ante</i> , Vol. XIV. 372. |

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At least the Plaintiff is entitled under the farther Description "personal Representative." The Right of the Husband to succeed to the Property of his Wife is, as the Title of the Heir at Law, considered with Favor. The Effect of these Words is the same as if the Property had been directed to go by Devolution of Law.

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Mr. Wetherell, for the Defendants.

This is decided in Principle by the last Case, *Nichols v. Savage*: a residuary Bequest "to all and every my next of Kin that would have been entitled to my personal Estate under the Statute made for Distribution of Intestate's Estates, in case I had died intestate:" it was clearly decided, that the Widow was not entitled to a Share: proving with the *Lord Chancellor's Judgment* in *Garrick v. Lord Camden* the uniform Opinion of the Court; and removing all Argument upon *Dicta* to be found as to the Interpretation of the Words "next of Kin." The *Lord Chancellor* says (*a*), whatever may have dropt from Judges, describing the Husband as next of Kin of his Wife, the whole Course of modern Authority is against the Construction, that either can take under the simple Description of next of Kin of the other; clearly adverting to the Case of *The King v. Bettsworth* (*b*); where those Words are used inaccurately. In *Davis v. Baily* (*c*) and *Worsey v. Johnson* (*d*) Lord *Hardwicke* held the Widow not included under the Term "Relation;" observing, that strictly the Wife is no Relation to her Husband. *Lord Loughborough* decided the Case of *Watt v. Watt* (*e*), not on the peculiar Expression of the Settlement, but on the broad Ground, that the Husband is not next of Kin of his Wife. The Course of the modern Au-

(*a*) *Ante*, Vol. XIV. 381. (*d*) 3 *Atk.* 758.

(*b*) 2 *Str.* 1111.

(*c*) *Ante*, Vol. III. 244.

(*c*) 1 *Ves.* 84.

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thorities is therefore uniform ; that the *Dicta*, describing Husband and Wife as next of Kin to each other, are inaccurate ; and it is obvious, that between them Relation cannot subsist in the Sense of Sir William Blackstone, as Persons *de eodem Stipite descendentes*.

The additional Description in this Settlement, “ or “ personal Representative” though not in Law precisely synonymous with “ next of Kin” must, as here used, receive the same Construction. Who may be entitled to Administration is an Accident, that cannot be regarded in the Construction of an Instrument. In the Two last Cases, *Garrick v. Lord Camden* and *Nichols v. Savage*, where there was the same Conflict between the different Parts of the Sentence, the first Description “ next of Kin,” was held to convey the real Meaning ; and no Effect was given to the added Words.

Mr. Hall, in Reply, observed, that there is a material Distinction between Husband and Wife, with regard to Character and Succession ; that the particular Terms of the Settlement in *Watt v. Watt* were the principal Foundation of the Judgment ; and that in *Nichols v. Savage* the Description was next of Kin, that would have been entitled to the personal Estate under the Statute of Distributions ; under which the Widow takes in her peculiar Character, not as next of Kin.

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*The MASTER of the ROLLS.*

March 21.

The Question before the Court is not, whether the Husband can in any Case or for any Purpose be, as he has sometimes been called, the next of Kin of his Wife ; but, whether according to the true Construction of this Settlement it was intended, that the Husband should take under that Denomination. In the Cases, where the Hus-

band

band has been spoken of as next of Kin of his Wife, the only Thing in question was his Right to administer; and that Right has frequently been called his Right as next of Kin. In those Cases there was no Occasion to consider, whether by a Limitation to the next of Kin of the Wife he would be entitled to her Property after her Death. In the Case of *Watt v. Watt* (a) that precise Question came before Lord Loughborough; and he did determine it; for though in some Clauses of the Settlement, not in all, the Words "of her Family" were added to the Description "next of Kin" yet the clear Opinion of the *Lord Chancellor* was, that he did not at all answer the Description; and the present *Lord Chancellor* in the Case of *Garrick v. Lord Camden* declared the same Opinion; though it was not the Point immediately before him.

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In this Case it is impossible, that the Husband could be intended. The Subject of the Settlement was the Wife's Fortune of £700. The only Benefit he was to take was the Interest for his Life in £200, Part of that Fund; and she was to have the Interest of the Remainder for her separate Use: if she survived, the whole was to be her's; if he survived, it was to go according to her Appointment; and, in Default of Appointment, in Trust to her next of Kin or personal Representative.

It seems to me, the Intention was evidently to exclude him. Had it been meant, that he should take by surviving her, the Expression was quite obvious, that in that Event and in Default of Appointment the whole of these Two Sums should be paid to the said *Samuel Bailey* for his own Use. Both are mentioned by their Names, wherever they are spoken of in this Settlement: but they had a

(a) *Ante*, Vol. III. 244.

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View

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View to uncertain Persons; who could be designated only by some general Description. Indeed it seems hardly conceivable, that in a Marriage Settlement a Limitation to the Wife's "next of Kin" can be introduced, except for the Purpose of excluding the Husband; and if the Intention was to exclude him by the first Words "next of Kin," he cannot be let in under the subsequent Words "personal Representative." Whatever these Words might mean, standing by themselves, they cannot, as here used, take from the first Words the Sense they properly bear, and were in this Case obviously intended to bear.

The Bill of the Husband must therefore be dismissed with Costs.

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1811,  
April 30.  
May 13.

Relief against Forfeiture of a Lease for Breach of Covenant not extended beyond the Case of Payment of Money, as in the Instance of Rent, to the other Covenants; as to repair.

## HILL v. BARCLAY.

THIS Case (*a*), having been again argued upon a Motion to dissolve the Injunction, stood for Judgment.

Sir Samuel Romilly, and Mr. Wingfield, for the Defendant: Sir Arthur Piggott, Mr. Richards, and Mr. Agar, for the Plaintiff.

## The Lord CHANCELLOR.

The legal Effect of the Covenants in this Lease is, that, if the Tenant did not within a limited Time after Entry lay out £150 at least, or did not keep the Premises in Repair, or, if the Landlord chose to dispense

(*a*) Reported *ante*, Vol. XVI. 402.

with

with that Circumstance, and gave Notice to the Tenant to put them in compleat Repair within Three Months, and he did not so repair, the Landlord has by the express Contract a Right to enter, and determine the Interest of the Tenant. The Effect of these Covenants at Law may be put another Way; that this was to be a Lease, until the Tenant should after Three Months Notice fail to put the Premises in compleat Repair.

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The Bill suggests, that an Equity to be relieved against the Forfeiture at Law by Breach of the Covenant arises out of a Difference in the Ecclesiastical Court upon *Hill's Will*. I think, as Lord *Erskine* thought in *Sanders v Pope* (a), that the Circumstance of the Will of the Assignee of the Lease being in Controversy in the Ecclesiastical Court, as it certainly would form no Answer to an Ejectment, so of itself it cannot be a Ground for Relief in Equity. For the Plaintiff it has been insisted, that the Notice to do the Repairs was given at an inconvenient Season, (in *September*); that it was required at a Time, when probably the Repairs could not on Account of the Weather be compleated; and, admitting, that no Step was taken, though in Fact there was nothing to prevent the Repair within the Time, it is contended, that their so reasoning upon the Time is a Circumstance, that entitles them to Relief in Equity; that, having began to repair in *January*, after the Ejectment brought, they were proceeding; and the House would have been put in as good Repair as if the Notice had been complied with; and upon these Grounds this Court relieves against an Ejectment. The Bill contends farther, that, a Sum of Money, sufficient to put the Premises in compleat Repair, being laid out after the Time specified in the Covenant, they will be put in compleat Repair; and therefore this

(a) *Ante*, Vol. XII. 282.

Court

## CASES IN CHANCERY.

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Court ought to give Relief upon a Principle of Equity, resulting from that Act of the Tenant, putting them in such compleat Repair; and a Controversy is raised by the Affidavits on each Side with regard to this Point, which I find it extremely difficult to understand, whether the Premises are not considerably better for not having been repaired until after the Time, than if the Repairs had been done at the Time stipulated: that is, whether the Effect of the Winter being past does not make the State of Repair more compleat and desirable, than if it had been done in the preceding *September*.

Upon these Grounds the Motion was made for an Injunction to restrain the Ejectment; against which, it was admitted, there could be no Defence at Law; and the Tenant was therefore required to give Judgment, subject to such Terms as the Court should think reasonable. The Question now is, whether upon such Circumstances as are now before me, the Principle of Equity will maintain me in holding, that a Landlord shall not have the legal Effect of his Covenant. Very modern Times have produced Two Cases, perhaps not quite so contradictory as they appear to be; though it may not be very easy to reconcile the Principles, supposed to govern them. In *Wadman v. Calcraft* (a) the *Master of the Rolls* lays down, as Doctrine, making a strong Impression on his Mind, that, though against an Ejectment for Non-payment of Rent the Court would relieve, upon a Principle long acknowledged in this Court, but utterly without Foundation, it would not relieve, where the Right of the Landlord accrued, not by Non-payment of Rent, but by Non-performance of Covenants, which might be compensated by Damages. That Case coming afterwards before me, my Mind was so strongly impressed with the Dis-

(a) *Ante*, Vol. X. 67.

tinction

between this Sort of Covenant and a Covenant  
of payment of a Sum of Money, or Rent, that I  
see the Distinction ; and put the Party to an im-  
possibility to ascertain, whether upon the Non-per-  
formance of such Species of Covenant the Right of Entry  
is to be affected upon at Law ; and, as it appeared, that  
the Tenant's Right of Entry might be maintained, no Relief was given.

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The Decision of the subsequent Case of *Sanders v. Pope* (*a*) does not seem to me to govern this Case. The Tenant there, not having laid out the Sum of £200 in Repairs within the Period expressed by the Covenant, offered afterwards to lay out that Sum ; and it does not appear, that there had been any Dealing by Request and Refusal between the Lessor and Lessee in the Period, during which by the express Covenant the Money ought to have been applied. The Injunction, which had been continued by an Order of the *Master of the Rolls* (*b*), implies a Declaration of his Opinion, that the Case was to be regarded as a Case, that might admit Relief. Lord Erskine's Opinion also was, that, the Covenant specifying a liquidated Sum to be laid out within a given Time, and as the Landlord could not be injured by the Expenditure of that Sum, with an Increase, after the Time had expired, and all the Costs, Relief was in the Discretion of the Court.

The original Cases upon this Subject are of different Sorts. The Court has very long held in a great Variety of Classes of Cases, that in the Instance of a Covenant to pay a Sum of Money the Court so clearly sees, or rather fancies, the Amount of Damage, arising from Non-payment at the Time stipulated, that it takes upon itself to act, as if it was certain, that giving the Money Five

(*a*) *Ante*, Vol. XII. 282.(*b*) *Ante*, Vol. XII. 213.

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Years afterwards with Interest it gives a compleat Compensation. That Doctrine has been recognized without any Doubt upon Leases with reference to Non-payment of Rent, upon Conditions precedent, as to Acts to be done, Payment of Money in Cases of specific Performance, and various other Instances: but the Court has certainly affected to justify that Right, which it has assumed, to set aside the legal Contracts of Men, dispensing with the actual specific Performance, upon the Notion, that it places them, as near as can be, in the same Situation as if the Contract had been with the utmost Precision specifically performed: yet the Result of Experience is, that, where a Man, having contracted to sell his Estate, is placed in this Situation, that he cannot know, whether he is to receive the Price, when it ought to be paid, the very Circumstance, that the Condition is not performed at the Time stipulated, may prove his Ruin, notwithstanding all the Court can offer as Compensation.

There is however no Doubt, that the Court has always acted upon this as to Rent; and there is also legislative

Stat. 4 Geo. 2, c. 28, regulating the Relief of a Tenant against a Forfeiture for a Breach of Covenant by Non-payment of Rent.

Authority for it by the Statute (a), which passed in 1731; regulating the Powers of Courts of Equity in that Article, limiting the Time, within which the Lessee, who has failed in paying his Rent, may file a Bill to have his Lease restored; specifying the Terms, upon which the Relation, though according to the Contract at an End, shall upon the equitable Doctrine, aided by legislative Provision, continue in Force between them. If it was understood at that Time, that in a great Variety of other Cases this Court upon its equitable Doctrine would relieve against Forfeiture, among other Instances in this of a wilful Neglect to repair, if it was then the acknowledged Doctrine of this Court, that the Lease, forfeited by the Contract;

(a) Stat. 4 Geo. 2, c. 28, s. 2, 3, 4.

might

might be set up again by the Tenant, coming at any Time with an Offer to do that, which he had wilfully omitted at the Time he had stipulated, it is much to be lamented, that the Power of the Legislature was not interposed in a Case, upon which its Interference was much more desirable. Imperfect and unjust as the Operation of the Rule for giving Relief in Equity against a Forfeiture for Non-payment of Money must be in most Cases, yet, if the Rule is established, that Payment with Interest from the Time is a Compensation, that is an extremely simple Rule for administering the Equity: but, if a Court of Equity is to trust itself in all Cases with the Consideration of such a Question as this, whether it is just, that a Tenant should come here to prolong the Duration of a Lease, by his express Contract determined, if the Property has not been treated in a Husband-like Manner, the Court has not so sure a Guide as the Calculation of Interest upon a Sum of Money; and, considering the Depositions of Surveyors in this Court, or the Declaration of one of these Plaintiffs, as represented by the Answer, that the Premises are in such Circumstances, that, when all the Repairs are made, it will be a bad Business, the Notion, that the Court upon such Evidence can be sure, that it gives the Party a Compensation in Damages, appears ridiculous.

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I notice this particularly on account of one Case (*a*), where the *Lord Chancellor* appears to go a Length, to which no Judge should follow without great Consideration. According to the Note, which is but loose, his Lordship seems to have thought, that the equitable Jurisdiction might be applied on this Ground; that if the Repairs of the Premises, under a Covenant always to be kept good, are done at the Close of the Term, the Land-

(*a*) *Brown v. Quilter, Amb. 619.*

lord

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Lord would have his Premises in excellent Condition from their not being done sooner. The Court is surely not authorized so to deal with Contracts. I do not mean to apply these Observations to Cases of Accident and Surprise; the Effect of the Weather, for Instance, in this Case, or permissive Want of Repair; the Landlord standing by and looking on. A particular Case might perhaps occur, such as are put by Lord *Erskine* in *Sanders v. Pope*, in which it would be demonstrable, that the Landlord would sustain no Injury by the Relief: but it is taking a prodigious Liberty with a Contract, by which the Tenant has undertaken forthwith to repair, and to keep the Premises in Repair constantly; in order that the Landlord may during the whole Currency of the Term have the Property, if returned upon his Hands, in exactly the State he intended.

If this Doctrine can be maintained in general Cases, what is to be said of the Case, where, the Court administering this Species of Equity, the Tenant has become Bankrupt before the End of the Term, the Assignees refuse to take to the Lease, and the Premises are thrown back to the Lessor in a State of utter Non-repair? Would that be any thing like an Execution of the Contract? So in the Case of Copyhold Estate, where there is a Forfeiture upon Waste. The Distinctions, that have been taken, go, not only to the Question, whether it is perfectly clear, that Compensation for the Damage can be made in this Respect, that the Landlord can be placed in the same Situation to all Intents and Purposes, but also to another very material Consideration; whether the Non-payment of the Money, or the Waste, was wilful, or not. There may be Cases, where, morally speaking, a Court of Equity would interpose with much less Reluctance than in another Sort of Case; where, for Instance the Landlord offered to overlook the past Negligence on Condition, that

that the Repairs should be done within Three Months; if the Tenant still refused, upon what Ground, having wilfully refused, and violated all his Covenants, could he desire a Court of Equity to place him in exactly the same Situation as if he had performed them, and demand a Decree, giving him the Benefit of the Offer, which he had positively refused?

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So, with regard to other Cases, the Doctrine I have repeatedly stated is all wrong, if it is to be taken, that Relief is to be given in case of a wilful Breach of Covenant. I allude to Cases, where I have intimated my Opinion, that a Tenant, who has committed Waste, treated the Land in an Unhusband-like Manner, and been guilty of various Breaches of Covenant, for which the Lessor had a Right of Re-entry, should not have a specific Performance of an Agreement for a Lease. The Effect of omitting Repairs may produce as much Mischief to the Estate as Waste; the latter is as capable of Compensation as the former; and there is no Difference between Covenants, thus resting in Damages, and another, against the Breach of which it is admitted the Court will not relieve, a Covenant not to assign without Licence; upon which it is clearly settled, that, if an Ejectment is brought upon a Right of Re-entry reserved, the Lessee can have no Relief: he cannot shew, that by the Assignment the Lessor sustains no Damage; that on the contrary he, the Lessee, is a Beggar, who could not pay the Rent, and the Assignee a solvent Tenant; that the Lessor is therefore in a better Condition; having two Persons answerable to him instead of one Tenant under the Circumstances I have mentioned. The Answer is, that the Court cannot estimate the Damage: the Fact, as it is alledged, may be true at this Moment: but the Consideration, whether the Lessor is to gain or lose by having a Tenant put upon him, must run through the whole Continuance

Tenant, having committed Breaches of Covenant by Waste, treating the Land in an Unhusbandlike Manner, &c. not entitled to specific Performance of an Agreement for a Lease.

No Relief against Forfeiture by Breach of Covenant not to assign without Licence.

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of the Lease: it is sufficient, that the Lessor insists upon his Covenant; and no one has a Right to put him in a different Situation. The Distinction has been taken, that Relief may be had against the Breach of a Covenant to pay Money at a given Day; but, not, where any Thing else is to be done. So the Case of Forfeiture of a Copyhold by Acts, which really do no Damage to the Lord, as where a Tenant for Life forfeits his Estate, stands on the same Ground. In all these Cases the Law having ascertained the Contract, and the Rights of the contracting Parties, a Court of Equity ought not to interfere.

With regard to the Circumstances of this Case I take the Lessor, calling for the Repairs to be done within Three Months, to have dispensed with his Right of Entry under the general Covenant: but, the Premises being at that Period in a State of gross Dilapidation, the Lessor says, he, who was entitled to have them put in Repair at the Commencement of the Lease, and to have them kept in Repair to that Time, having also, as being entitled to the Benefit of all Circumstances, affecting the Value of the Lease in future Time, the Right to require the Repairs to be done within Three Months, did make that Requisition; expressly signifying, that, if they were not done within that Time, he would avail himself of his legal Right. Not one Step was taken in Compliance with that Requisition. Am I then to speculate under such Circumstances; and determine, that it is so clear, that the Repairs, if done in future, will be equally, or more, beneficial, that all the Contract between them should be undone? My Opinion is, that this is more than is authorized by any Decision; and therefore the Injunction must be dissolved.

PARR,

PARR, *Ex parte (a)*.1811,  
May 15.

THIS Petition stated, that in *February, 1811*, a Commission of Bankruptcy issued against *Leigh and Armstrong*, of *Liverpool*, carrying on Trade under the Firm of *Leigh and Armstrong*; and that they were indebted to the Petitioner *James Parr*; as surviving Partner of *John Parr*, deceased, in the Sum of £12,238: 14s: 2d. for Principal and Interest on Fourteen Bills of Exchange, drawn by Persons at *Demarara*, under the Firm of *Brumell, Heyliger, and Co.*, in Favor of *John and James Parr*, and accepted by the Bankrupts; which Bills were given by *Heyliger, and Co.* to *John and James Parr* for Monies, actually received by *Brumell and Co.* to and for the Use of *John and James Parr* to the full Amount. A Debt of £4340 was claimed by the other Petitioners *Shaw and Co.*, under similar Circumstances.

The Petition then stated, that, *Leigh and Armstrong* not having paid the Bills, *Brumell and Heyliger*, being pressed by the Petitioners, assigned to them Two Plantations at *Essequibo and Berbice*, in *America*, in Mortgage, for the Purpose of securing the Balance due upon the Bills, by Indentures, dated the 1st of *January, 1806*; and it was expressly covenanted, agreed, and understood, that the Security, thereby given, should not be considered as any Waiver of the Security, which the Petitioners *Parr* and *Shaw* respectively should have against the Acceptors of the Bills, or any other by virtue of them, except *Brumell*.

(a) 1 Rose's Bankrupt Cases, 76.

rected; though the *Lord Chancellor* would not interfere, if a Creditor had been excluded by Mistake, not for the Purpose of preventing his voting.

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*mell and Heyliger*; nor against them farther than giving them Time for Payment.

The Petition farther stated, that the Commissioners rejected the Proof of the Petitioners, until they had disposed of the Mortgage; or until it should have been valued; holding, that they could only prove the Balances of their respective Debts, after deducting the Price or Value of the Mortgage. The Petitioners stated to the Commissioners, that, if allowed to prove, they should vote for *Thomas Parr* to be the Assignee; who was proposed by another joint Creditor; and the Majority in Value of the joint Creditors present, whose Debts amounted to £10, voted for *Thomas Parr*: but the Commissioners declared, that he was not elected Assignee; and, the Majority in value of the separate Creditors present, whose Debts amounted to £10, having voted for Three other Persons, and the Amount of the Debts of those separate Creditors exceeding the Amount of the joint Creditors, who had been allowed to prove, and who voted for *Parr*, the other Three Persons were declared the Assignees.

The Petition prayed, that the Petitioners may be admitted Creditors under the Commission, and be paid Dividends rateably with the other joint Creditors; and that *Thomas Parr* may be declared to have been duly elected sole Assignee; or, that a new Choice of Assignees may be had.

An Affidavit, made by the Bankrupts, stated, that previously to 1799 they carried on Business at Liverpool as Merchants under the Firm of *Leigh and Co.*, and under the Firm of *Armstrong and Co.* at Demarara, and in 1799 they took into Partnership with them at Demarara *Heyliger*, and soon afterwards *Brumell*. The Deponents put an End to that Partnership in 1801: the Accounts were never finally settled; and a considerable Balance will

be

be due upon a Settlement from *Brumell* and *Heyliger*. The Bills in the Petition mentioned arose out of the said Partnership Transactions; and were drawn and accepted, while the Deponents and *Brumell* and *Heyliger* were so in Partnership; and the Mortgage was obtained as a further Security for the Bills.

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*Mr. Leach*, and *Mr. Agar*, in support of the Petition.

Two Objections are made by this Petition: first, that the Commissioners acted erroneously in refusing the Proof, until the Security had been made available: secondly, that under a joint Commission a Choice of Assignees by separate Creditors cannot be supported. The Reason for refusing the Proof upon these Bills was, that the Petitioners held another Security from the Drawers. Upon what Principle can that stand? It would be correct, if they held a Security on the Bankrupt's Estate; which is *prima facie* a Satisfaction: but with regard to distinct Security from another Person, the Creditor has a Right to avail himself of all his Securities (*a*). The Acceptor, if an Action was brought against him, could not object, that the Holder had other Security from the Drawer. It is true, *Leigh* and *Armstrong*, the Bankrupts, were Partners in the House at *Demarara*; and admitting that House to have been Debtor to the House in *London*, the Objection would be, that the Creditor, giving Time to the Principal, discharges the Surety: but the Creditor had no Knowledge, that the Acceptor was, not the principal Debtor, but in Truth a Surety; having accepted without Consideration.

With regard to the Choice of Assignees, admitting the Rule of Convenience, that your Lordship will not interfere, unless some Creditor has been excluded for the very Purpose of obtaining that Choice, this Case has

(*a*) *Ex parte Bloxham, Ante*, Vol. VI. 449. 600.

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sufficient Grounds for setting aside the Choice. If the Choice of Assignees is with the joint Creditors, *Thomas Parr* was duly chosen: only one joint Creditor voting against him. The Question therefore is, whether the separate Creditors had any Right to vote; depending, not on Usage, but positive Law. They are not Creditors within the Sense of the Act of Parliament (*a*); which directs the Choice of Assignees to be by those Creditors, who could prove under the Act. The separate Creditors are not entitled to prove by the Authority of the Act; but are admitted to prove their Debts under the general Order (*b*); that they may have the separate Property administered for their Benefit. The Effect of such an Arrangement, whether by a general or special Order is the same. They are admitted, not under the Statute, but by the special equitable Jurisdiction of the *Lord Chancellor*, by Analogy to the Case of joint Creditors applying to prove under a separate Commission; which, for the Purpose of voting in the Choice of Assignees, or receiving Dividends, is constantly refused, unless in the excepted Cases; as, where the separate Creditors are paid 20s. in the Pound (*c*).

Sir *Samuel Romilly*, and Mr. *Bell*, for the Assignees.

These Petitioners holding Bills, drawn by the House at *Demarara* upon, and accepted, by the House at *Liverpool*, the Members of which House were also Partners in the House at *Demarara*, cannot be admitted to prove, until they have made available another Security, which they hold.

(*a*) Stat. 5 Geo. 2. c. 30.  
 s. 26.

(*b*) General Order, 8th  
 March, 1794, 4 Bro. C. C.  
 543.

(*c*) *Ex parte Dastaset*,  
*Ante*, Vol. XVII. 247. *Ex parte Taitt*, *Ante*, Vol. XVI.  
 193. *Ex parte Ackerman*,  
*Ante*, Vol. XIV. 604.

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The Rule as to the Choice of Assignees is, that your Lordship will not interfere merely on the Ground, that some Creditor has voted, who strictly had not a Right to vote: but something more must be shewn; as in a late Instance, that a Creditor was prevented from proving for the mere Purpose of preventing his voting in the Choice of Assignees; and was permitted to prove after the Assignees were chosen (a). The Practice is to permit the separate Creditors to vote; and it would be most unjust, that an Arrangement for the Purpose of general Convenience, and to prevent Expence, should affect the Rights of any Class of Creditors.

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### *The Lord CHANCELLOR.*

As to the Right of the Petitioners to prove without bringing to Market their Security, if it stood simply upon this State of Circumstances, a House in *Demarara* drawing upon another House in *London*, and that House accepting, and the Drawers, having, when they drew, given another Security, the Acceptor is liable *prima facie*; and, unless he has been discharged by some Dealing, the Circumstance of a Security taken will not authorize the Commissioners to refuse the Proof. It is said however, that the House at *Liverpool* was Partner with the other House: but it has been established above Thirty Years, that the same Persons may be both Drawers and Acceptors, as constituting different Firms. The Petitioners have therefore a Right to prove without deducting the Value of the Security; and the Question between the Two Houses will arise after the Proof of the whole Debt; and will affect the Dealing with this Property, after they have paid 20s. in the Pound, and not before (b).

(a) *Ex parte De Tastet*, (b) *Ante*, Vol. VIII. 546,  
1 *Ves. & Bea.* 280. *Ex parte Bonbonus.*

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PARB,  
*Ex parte.*

**Joint Creditors cannot vote in the Choice of Assignees under a separate Commission, even if there is only one separate Creditor: but an Arrangement will be made for the joint Creditors by Order.**

**The Choice of Assignees is with the Creditors, entitled to prove under the Act of Parliament; excluding Persons, who could not be admitted without an Order; as separate Creditors under a joint Commission; now admitted under the General Order (8th March, 1794).**

The Rule is correctly stated at the Bar, that it is not the Habit to interfere with the Choice of Assignees merely on account of a Mistake of the Commissioners, excluding one Creditor; if it occurred in the fair Exercise of their Discretion: but this is not a Case of that Sort: the Objection being, that this is a Choice of Assignees by Persons, who had no Right whatsoever to choose them. In the Case of a separate Commission it has been frequently determined, that though an Arrangement will be made here for the joint Creditors, they cannot vote in the Choice of Assignees; which before Lord Thurlow went this Length, that the Creditor, who took out the Commission, if there was no other separate Creditor, might choose himself: and in one Instance Lord Thurlow appointed, at the Expence of the joint Estate Persons to deal with that Estate adverse to the separate Creditors; as a Sort of Trustees; refusing to make them Assignees. The Converse of that Rule must be equally true; that separate Creditors cannot vote in the Choice of Assignees under a joint Commission: the Choice being with those Creditors, who go in, not by the particular Order made here, but by their Right under the Act of Parliament; and those Creditors, who now go in under that General Order, made by Lord Rosslyn, before could not have gone in without a particular Order under the Lord Chancellor's general Jurisdiction to dispose of the Bankrupt's Property; and generally, before they could obtain that Order by Application here, the Assignees were chosen.

The Order declared the Petitioners entitled to prove their Debt without deducting the Value of the Security they held; and directed, that another Meeting should be held for the Choice of Assignees (a).

(a) See *Ex parte Longman*, the next Case.

*Ex*

*Ex parte LONGMAN.*

1811,  
May 15.

UNDER a separate Commission of Bankruptcy this Petition was presented by joint Creditors of the Bankrupt and his Partner, *John Drake*, who was in *Portugal*; stating, that by an Order, reciting, that the Assignees under the separate Commission had possessed joint Property, it was ordered, that the Petitioners and the other joint Creditors should be admitted to prove under the separate Commission. The Petition prayed, that the Assignees may be removed; and that a Meeting may be directed for the Choice of new Assignees.

Sir *Samuel Romilly*, and Mr. *Cullen*, in support of the Petition.

Under the Circumstances a new Choice was ordered: but the joint Creditors were not permitted to vote in the Choice.

The Lord CHANCELLOR said, he thought the Practice of letting joint Creditors vote in the Choice of Assignees under a separate Commission wrong: he did not conceive Lord *Rosslyn's* General Order was by any Means intended to alter the Rights of joint and separate Creditors with regard to each other; and the Choice of Assignees (8th March, 1794) not intended to alter the Rights of joint and separate Creditors with regard to each other.

(a) *Ex parte Purr*, the preceding Case.

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**Bill by a Bankrupt, and the Assignee under an Insolvent Act, of which he afterwards took the Benefit against Representatives of the deceased Assignees, and others, for an Account of his Estate and various Transactions before and since the Bankruptcy : no Assignee in the Bankruptcy being a Party, and Collusion with Persons accountable to the Estate charged against only some of the Representatives of the Assignees.**

Demurrer al-

lowed, generally for Want of Equity, and as Relief might be had by Petition in Bankruptcy ; and *ore tenus*, the Suit being multifarious ; as uniting Parties, though in some Respect connected, having distinct Interests.

**SAXTON v. DAVIS (a).**

**T**HE Bill, filed by *Daniel Saxton* and *Robert Jones*, stated, that the Plaintiff *Jones*, a Carpenter and Builder at *Bristol*, was in 1793 possessed of considerable Property; and, having engaged to assist Persons, to whom he had made building Leases, in 1792 he employed the Defendant *Henry Davis*, as his Attorney, and to act generally as his Agent; who undertook to procure him Money; that various Transactions accordingly passed between them ; and in the Result the Property, received by *Davis*, far exceeds what was justly due to him ; and upon a fair Account a considerable Sum is due from him to the Plaintiff.

The Bill farther represented, that, the Plaintiff *Jones*, having deposited all his Title-deeds with *Davis*, and placing the most unbounded Confidence in him, he obtained the absolute Controul of all the Plaintiff's Affairs ; and stated various Transactions, Mortgages, and Sales, fraudulent Conveyances to himself under Pretence of Mortgage, refusing to let *Jones* read the Deeds, before he executed, Securities obtained by Threats, without Consideration, &c. that by these Transactions *Jones* became embarrassed ; and on the 22d of March, 1793, was arrested, and committed to Prison for Want of Bail ; where he remained until November, 1795 : but on the 17th of April, 1793, a Commission of Bankruptcy issued against

(a) 1 Rose's Bankrupt Cases, 70.

him;

him; under which he was declared a Bankrupt, *Davis* himself sued out and prosecuted that Commission; and had the sole and exclusive Management and Direction of it; and he caused *Richard George* and *Richard Farman*, his particular Friends, to be chosen Assignees. *Farman* died; having accounted with *George* for his Acts as Assignee. *George* afterwards died; having appointed the Defendant *Bence* one of his Executors: after the Death of *Farman* no other Assignee was appointed for a considerable Time: but some Time afterwards the Defendant *Henry Pater* was by the Instigation and Influence of *Davis* chosen Assignee: but no regular Assignment has been made to him; and he was only chosen as a Colour, and to countenance the Bankruptcy.

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The Bill farther stated, that *Jones*, having been thus defrauded by *Davis* of the whole of his Property, and having been in Confinement nearly Three Years took the Benefit of the Insolvent Act, 34th and 35th Geo. 3.; under which his Estate and Effects were conveyed and assigned to the Defendant *John Long* in Trust for himself and all the other Creditors of *Jones*; and that *Long*, instead of bringing *Davis* to account, abetted him, and was an active Party in many of his Acts; and in consequence *Long* was by an Order of the Court of King's Bench removed from being the Assignee under the Insolvent Act; and the Plaintiff *Saxton* was appointed Assignee in his Room; and is now the Assignee under the Insolvent Act; that no Part of the Estate of *Jones* was fairly sold under the Commission of Bankruptcy: but *Davis* has possessed himself of the whole under some pretended Right or assumed Trust; and has never accounted.

The Bill, then stating Applications by the Plaintiffs to *Davis*, to account, and restore the Property, to *Bence*, the surviving Executor of *George*, to account for *George's* Acts,

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Acts, Receipts, &c. under the Commission, and assign to *Saxton*, Applications to *Long*, for the same Purpose, and to *Pater* to assign to *Saxton* all Right and Interest under the Commission, charged all the Allegations before stated, and particularly that *Davis* has in some Manner satisfied all or the most Part of *Jones's* Creditors, and obtained from them Discharges for their respective Claims: but he did not pay to them the whole Amount of their respective Demands, but some small Sum in lieu thereof; and there has never been any Dividend declared under the Commission; that at the Death of *George* he was indebted to *Jones's* Estate on Account of his Assigneeship; and *Bence* refuses to account to *Saxton*; that *Long*, while he was Assignee under the Insolvent Act, possessed divers Parts of the Estate; and has never accounted for the same; and he also conveyed and assigned to or in Trust for *Davis* divers Parts of *Jones's* real and Leasehold Property and Effects without any valuable Consideration, and at the Instigation and under the Directions of *Davis*; and the Defendants *Ashton* and *Evans* were stated to claim some Interest as Trustees under *Jones's* Marriage Settlement.

The Bill prayed, that *Davis* may account for his Receipts and Payments, and pay to *Saxton* what shall be found due; and that he may account for the real and Leasehold Estates and other Property, &c.; that his Purchases may be declared fraudulent, and be set aside against the Plaintiffs and the Creditors; that he may be declared a Trustee for the Plaintiff as to all Mortgages and Incumbrances paid off, bought up, or otherwise discharged, &c.; and Accounts were prayed against *Bence* of *George's* Receipts and Payments, and of his personal Estate, if necessary; and against *Long*, and *Pater*, respectively; and that they may respectively pay and assign to the Plaintiff *Saxton*.

To

To this Bill a joint Demurrer was put in by the Defendants *Davis, Bence, Pater, and Evans*, on Two Grounds: first, that the Plaintiffs have not by their Bill made such a Case as entitles them to Discovery and Relief: secondly, that it appears by the Plaintiff's own shewing, that, if entitled, they might have full and compleat Relief under the Jurisdiction of the *Lord Chancellor* in the Bankruptcy.

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*Sir Samuel Romilly, and Mr. Bell, in support of the Demurrer.*

The first Question is, whether a Bankrupt can file a Bill against the Assignees under the Commission, merely alledging Misconduct by them; particularly a Bill of this Description; the Office Copy of which must be very expensive; Eighteen Years after the Bankruptcy, producing no Effects: the Bill stating, that no Dividend was ever made. If Proceedings so vexatious are added to the Difficulties, incident to the Office of Assignee, who can be expected to undertake it? Upon the Statement of the Bill neither Plaintiff has any Interest whatever. All the Interest of a Bankrupt in his Property is devested, and vests in his Assignees, so compleatly, that, while uncertificated, he cannot maintain an Action for any Property; nor, having obtained his Certificate, for any Thing, that belonged to him before his Bankruptcy.

This is established by several Decisions; particularly in *Bengfield v. Solomons (a)*; different only as it was under Circumstances much more favorable to the Bankrupt: yet the Demurrer to his Bill by the Mortgagees was allowed. On similar Grounds the Assignees may demur; and also, as the Bankrupt may have compleat Relief by Petition in

(a) *ante*, Vol. IX. 77.

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the Bankruptcy, he ought not take the more dilatory and expensive Proceeding by Bill; admitting, that in many Cases a Bill may be the more proper Course on account of the Appeal: but, if no peculiar Circumstances call for it, and compleat Relief may be had by Petition, the Bankrupt has no Option. In *Clarke v. Capron* (*a*) Lord *Rosslyn* decided expressly on that Ground. The mischievous Consequences of such a Bill are pointed out by Lord *Alvanley* in *Spragg v. Binkes* (*b*). It is now clearly established, that a Creditor unless he shews Collusion with the Executor, cannot maintain a Suit against a Debtor to Estate: *Elmslie v. Macaulay* (*c*). *Utterson v. Mair* (*d*). *Troughton v. Binkes* (*e*). This Bill is filed against a Person, who can be reached only through the Assignee, the responsible Officer of the Great Seal; and there is no specific Charge of Collusion, requiring the Interposition of this Court instead of the summary Proceeding, prescribed by the Legislature: a Remedy, which cannot be had in the Case of the Executor.

These are the Grounds of the Demurrer upon the Record: but there are others, which may be alledged *ore tenus*. The Bill is multifarious; calling for an Account against the Assignee, under the Act of Insolvency, and under the previous Commission of Bankruptcy, having no Connection. The Suggestion of Collusion between *Davis* and *Long*, the Assignee under the Insolvent Act, the Transactions being perfectly distinct, and relating to different Subjects, affords no Reason for involving them in the same Bill. It is not suggested, that the other Parties had any Concern with *Long's* Conduct. Another Objection is,

(*a*) *Ante*, Vol. II. 666.ferences in the Note (*a*),(*b*) *Ante*, Vol. V. 583.*Ante*, Vol. VI. 749, to *Alsa-*(*c*) 3 *Bro. C. C.* 624.*ger v. Roxley. Burroughs*(*d*) *Ante*, Vol. II. 95. 4*v. Elton, Ante, Vol. XI. 29.**Bro. C. C.* 270. See the Re-(*e*) *Ante*, Vol. VI. 573.

that

that this Bill, seeking an Account of the Affairs of a Bankrupt, does not bring before the Court any Assignee: alledging merely the Nomination of *Pater*; but expressly stating, that no Assignment was executed.

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**Mr. Leach, and Mr. Peacock, for the Plaintiffs.**

The Allegation of this Bill is, that the Assignees not only did not call *Davis* to account for his Transactions, but permitted him to have the whole Management of the Bankruptcy; and that by Collusion with them he obtained the Whole of the Property. The Objection is taken, that all the Objects of this Bill may be obtained by a Petition in the Bankruptcy; but can the Jurisdiction of this Court, upon equitable Grounds, be so disposed of? In general Experience the Habit is to direct a Bill to be filed, if the Subject, though otherwise proper for a Petition, is so important and complicated, that it is fit that it should be submitted to a Jurisdiction, liable to Appeal.

This Bill represents, and distinctly charges, Collusion of the Assignees with *Davis*; a Series of Conduct, tending to abet and aid him in fraudulently acquiring and retaining the Property; of which their Duty required them to compel an Account. Without Collusion he could not have obtained it; and the necessary Inference is, that all this arose from the Permission and Negligence of those, who ought to have managed the Sales and disposed of the Property to the greatest Advantage. In a Case of this Description, a Bill is obviously much more effectual than a Petition, by the Discovery, which the Assignees will be compelled to make; and on that Account the Court in the Exercise of its Discretion would have directed a Bill to be filed. *Ex parte Barfit* (*a*), and *Bromley v. Goodere* (*b*), support the Jurisdiction by Bill.

(*a*) *Ante*, Vol. XII. 15.      (*b*) 1 *Atk.* 75.

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The Case of *Benfield v. Solomons* was the common Case of a Bill by a Bankrupt against a Debtor to the Estate; which can only be sustained by Collusion with the Executors, clearly made out. In *Clark v. Capron* (a) the Subject was immediately under the Administration in Bankruptcy. The Question, brought forward by this Bill, is, whether a *Cestui que* Trust, though a Bankrupt, has not an Interest, that will entitle him to equitable Relief against the Trustee. There is an express Averment of a Surplus; which the Bill in *Benfield v. Solomons* had not.

With regard to the Objection, that the Bill is multifarious, it is only necessary to make out, as to those Parties, to whom that Objection is applied, that with reference to some of the Demands there is a necessary Connection between them: that is not required in all; and, the parol Demurrer being as entire as that upon the Record, if there is any Demand against both Defendants, that will support the Bill against this Objection. It is therefore only necessary to shew, that some Account is sought, in which there is a common Interest between the Defendants.

Sir Samuel Romilly, in Reply.

If this Bill can be maintained, the whole Administration of Baukrupcy will be transferred to the Court of Chancery; and Assignees will be in the Situation of Trustees in a Deed of Trust for Creditors; against whom a Bill may be filed by any Creditor on Behalf of himself and all the others. There is no Instance of such a Bill, either by a Creditor on Behalf of himself and all the others, or by a Bankrupt, suggesting a Surplus. The Allegation of this Bill is not that all the Creditors have been actually paid, but that *Davis* became the Purchaser of several Debts, and Property, as suggested, but

(a) *Ante*, Vol. II. 666.

not

not proved, for the Benefit of the Bankrupt. In *Ex parte Barfit* (*a*) there was an Agreement among the Creditors, that the Commission should not proceed farther; that the Bankrupt's Brother should purchase the whole Property; the Assignees conveying to him, undertaking to pay all the Debts. That was a clear Case for specific Performance by Decree, not for Administration in Bankruptcy. The Case of *Clark v. Capron* (*b*) is certainly a questionable Decision; and the Distinction taken does not appear solid. That however was the Case of a single Demand. *Bensfield v. Solomons* cannot be distinguished. The Collusion charged was with the former Assignees, not with *Pater*; to the Use of whose Name in setting aside these Transactions there could be no Objection.

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The Objection to a Bill, as multifarious, would be at an End, if the Answer could be admitted, that, all the Parties being concerned in one Transaction, all but that may be left out of Consideration: but it has been determined in *Ward v. The Duke of Northumberland* (*c*); where the Defendants, the Duke and Lord Beverley, being clearly concerned in one Account, but not in other Transactions, the Demurrer was allowed.

#### *The Lord Chancellor.*

This Demurrer upon the Objection to the Bill, as being multifarious, must be allowed clearly. The Bill with regard to that is filed under these Circumstances. *Jones* is stated to have become, by the Procurement and Misconduct of *Davis*, a Bankrupt in 1793; upon which Bankruptcy a Commission issued, which is now in full Force. In 1795 *Jones* took the Benefit of an Act for the Relief of Insolvent Debtors; the Consequence of which is, that

- (*a*) *Ante*, Vol. XII. 15.      (*c*) In the Court of Exchequer.  
 (*b*) *Ante*, Vol. II. 666.

the

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Prayer material in construing Charges not direct.

the Assignee under that Act has a Right to take from the Assignees under the Commission whatever Surplus might remain after paying the Creditors, who proved under the Commission, 20s. in the Pound and Interest. The two Assignees under the Commission are dead; and the Representatives of one are not before the Court: those of the other are; but not for the Purpose of making them answerable for Misconduct: if they were, and that Misconduct was common to both Assignees, the Bill would want Parties: but taking the Prayer and Charges together, the Bill is not framed with that View. The Prayer, which is material in construing Charges not direct, as to *George*, one of the Assignees under the Commission, is merely for an Account of what he actually received; and then the Bill, having charged Collusion by *Long*, the Assignee under the Insolvent Act, with *Davis*, prays an Account of all *Long's* Dealings. Clearly, though it seeks an Account against the personal Representatives of *George*, not charging him with any Connection with *Long*. Seeking to enforce different Demands against Persons, liable respectively, but not as connected with each other, it is clearly multifarious; and the Plaintiff cannot bring into the same Record the Representatives of *George* and *Long* but by a Case, differently stated from that upon this Record. If they could take Advantage of this Objection by Demurrer, *Davis* may take Advantage of it equally; as another Suit might be instituted against him To-morrow.

I should be sorry, however, to decide the Case upon that Point; as the other Ground of Demurrer is much more important. The Bankruptcy occurring in 1793, the subsequent Proceeding under the Act of Insolvency makes no Difference, at least in this Respect; as it is quite settled, that the Assignee under that Act may apply here by Petition under the Bankruptcy; and so may the Bankrupt: notwithstanding the Objection, taken to his

Want

Want of an Interest, entitling him to sue before Certificate, it is within the Jurisdiction in Bankruptcy to hear the Bankrupt with regard to that, which is acknowledged as an Interest, his Right to the Surplus, if there shall be any. As to that, the Assignee under the Insolvent Act stands in the Place of this Bankrupt.

In my View of this Bill it does not charge any such Collusion as against the Assignees under the Commission, who are dead, as would according to a Class of Cases, with which we are familiar, maintain a Bill by a Creditor against both the Executor and a Debtor to the Estate upon that Species of Combination. There is no Charge against the Representatives of George, the surviving Assignee: but the Bill simply prays an Account against him; and as to the subsequent Choice of *Pater*, it is expressly alledged, that he has never accepted that Trust. Under the Bankruptcy therefore, taking the Creditors to be paid, or not, there is no one representing the Estate as an Assignee: but there is not enough upon this Record to support the Conclusion, that all the Creditors are paid: consequently, taking all the Charges to be true as against *Davis*, and distinguishing them, as they affect his Acts before and after the Bankruptcy, (and as to the latter there is no Doubt, that I might relieve upon Petition), I am confident in these Circumstances, that the Assignee or any Creditor, might petition with regard to all Acts since the Commission issued; though it is difficult to maintain, that he might not proceed by Bill with regard to Acts, done before the Commission, unless he had proved a Debt under it; and refused to give it up.

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~~  
SAXTON  
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DAVIS.  
Bankrupt's  
Right to peti-  
tion in respect  
of his Interest  
in the Surplus.

No Difficulty then standing in the Way of a proper Assignee, the Demurrer is to be considered thus: 1st. Can one Creditor file such a Bill as this, which must operate as an Injunction against all Proceeding by Peti-

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1811.  
 ~  
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tion, without more Charge, affecting the existing Assignee, if there was one; or, as the Case stands upon the Record, without an Assignee. If such a Bill can be filed, I must consider what the Court is to do with regard to the Demand under the Bankruptcy, as well as under the Insolvent Act. I am not authorized to say, that, though there is now no Assignee, there will be none; and I must take into Consideration, that, if an Assignee should be chosen, he, or any Creditor, may petition in the Bankruptcy. The Jurisdiction in Bankruptcy being final, it might perhaps be proper to direct a Bill to be filed for the Information of the *Lord Chancellor*, sitting in Bankruptcy; just as the Court directs an Action, or a Case to a Court of Law; but, if I should make an Order upon Petition in Bankruptcy, pronouncing upon the Situation of *Davis*, and his Conduct either before or since the Commission, that Order must either be conclusive and make an End of the Suit, or it is a Nullity, that cannot be acted upon; and, if one Creditor may file such a Bill, every Creditor may; and the Bankrupt himself. In the Case of *Bromley v. Goodere* (a) *Lord Hardwicke* had great Difficulty. Unless the Right to Interest could be raised upon an Equity, which he saw in that Case, it is extremely difficult to perceive, what Jurisdiction the *Lord Chancellor* had in Bankruptcy to order the Interest to be paid, attending to the Words of the Statute. At all Events the Bill must be by a Creditor on Behalf of himself and all the others. If, however, as has been contended for the Plaintiffs, a Bill being filed, the Court will make a Decree, as it would have directed a Bill, yet it is clear, that much must be done under the Bankruptcy, before any Decree could possibly be made, that would do justice between the Two Estates, under a Commission of Bankruptcy, and under the Insolvent

(a) 1 *A&k. 75.* See 1 *Ves. & Bea. 345,* *Ex parte Koch.*  
*Act;*

**Act;** and upon the Circumstances, stated by this Record, which for this Purpose I must take to be true, I cannot conceive any Difficulty in bringing the Case on by Petition so that Relief may be given; and I am apprehensive of making a Precedent, an Instance of which the Bar cannot furnish.

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SAXTON  
v.  
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The Demurrer was allowed.

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**GOODIER v. ASHTON.**

ROLLS.  
1811,  
May 31.

**T**HE Bill prayed a Foreclosure against an infant Mortgagor.

Decree of  
Foreclosure  
against an In-  
fant, with a Day  
to shew Cause.  
(This has been  
altered since  
in *Mondey v.  
Mondey*, 1 Ves.  
& Bea. 223;  
directing, in  
case the Mort-  
gagees consent  
to a Sale, an  
Inquiry, whe-  
ther it will be  
for the Infant's  
Benefit.)

Mr. Hall, for the Plaintiff, proposed, instead of the usual Decree, to take a Decree for a Sale, as more advantageous to the Infant; which was therefore held to be the proper Course in *Booth v. Rich* (a), the only Instance certainly of such a Decree; and though a Decree for Sale would, as is observed in that Case, bind the Infant, who would have a Day to shew Cause against a Decree for Foreclosure, that would only enable him to shew Error in the Decree. The Rule in *Ireland* to direct a Sale in all Cases instead of a Foreclosure does not prevail here.

Mr. Wetherell, for the Defendant, said, a Sale would

(a) 1 Vern. 295.

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certainly

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~~  
GOODIER  
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ASHTON.

certainly be most beneficial to him ; as the Estate might be mortgaged for less than the Value ; and suggested the Propriety of a Reference (*a*) to the Master, whether it would be for the Infant's Advantage to accept the Plaintiff's Proposal.

*The MASTER of the ROLLS* said, the modern Practice was to foreclose Infants ; and he would not make the Precedent, if no Instance could be found, in which the Case cited was followed.

The usual Decree was made for a Foreclosure with a Day to shew Cause.

(*a*) This Course has been since adopted by the *Lord Chancellor* ; who declared, that he would make a Per-

cedent, if there was not one. *Mondey v. Mondey*, 1 *Ves. & Bea.* 223.

1811,  
June 27, 28, 29.

PULVERTOFT *v.* PULVERTOFT.

Voluntary Settlement void under the Stat. 27 *Eliz.* c. 4. against a subsequent Purchaser for valuable Consideration with Notice, though a fair Provision for a Wife and Children, an Injunction, restraining the Husband from selling, was refused : but a Demurrer by the Husband over-ruled, as covering too much : the Plaintiff being entitled until a Sale to an Execution of the Trust.

THE Bill, filed by *Sarah Pulvertoft*, by her next Friend, stated her Marriage with *James Richards Pulvertoft* in 1806 ; and that by Indentures of Lease and Release, dated the 14th and 15th of January, 1807, he conveyed Freehold Estates, to the Use of himself for Life, without Impeachment of Waste : with Remainder to Trustees to preserve Contingent Remainders ; and Remainders to his

his Wife for Life, and for the Benefit of their Children, and, for Default of Issue, to himself and his Heirs; and by other Indentures, dated the 13th and 14th of *August*, 1807, the settled Estates with others were conveyed to *Thomas Pulvertoft* and his Heirs; to secure the Sum of £800, advanced by him by Way of Mortgage; and, subject thereto, for the separate Use of *Sarah Pulvertoft*; with Remainder to the Use of *James Richards Pulvertoft* for Life; Remainder to Trustees to preserve Contingent Remainders; and, as to the Estates in the former Settlement, after the Decease of the Survivor and in the Event of no Children to the right Heirs of the Survivor; and as to the other Estates to the Children of *James Richards Pulvertoft* in Tail, with Remainder, subject to his Appointment by Will, to the right Heirs of the Survivor of him and his Wife. In *June*, 1808, another Settlement was executed; by which the Limitations to the Wife and Children were not varied.

1811.

~~PULVERTOFT~~

v.

~~PULVERTOFT.~~

The Bill farther stated, that the Mortgage was afterwards paid to *Thomas Pulvertoft*; and he and the other Trustees being desirous to be discharged from the Trusts, another Settlement was executed in *June*, 1810; conveying the Estates to other Trustees, upon the same Trusts for the sole and separate Use of *Sarah Pulvertoft*, and after her Decease upon such Uses and Trusts for the Benefit of *James Richards Pulvertoft* and *Sarah Pulvertoft*, and their Issue, if any, and the Survivor of him and her, his or her Heirs, &c., as were declared by the former Settlements. There was no Issue.

The Bill, charging, that as against *James Richards Pulvertoft* the Settlement was good, that he was not indebted at the Time of the Execution of the Deeds respectively, and that he was about to sell the Estate, prayed, that the Trusts of the several Indentures of 1807,

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1811.

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PULVERTORT
v.
PULVERTORT.

1808, and 1810, may be established, and carried into Execution, &c.; that the Defendant *James Richards Pulvertort* may be restrained from selling, charging or incumbering, the Estates, and that a Receiver may be appointed. An Injunction having been obtained, a Motion was made to dissolve it.

Mr. Leach, and Mr. Wakefield, in support of the Motion to dissolve the Injunction.

The Case of *Evelyn v. Templar* (*a*) is a Decision according to the Rule of Equity, and the Principle, from which it springs; that a Conveyance, taken against Conscience, with Notice of the Defect, must be held subject to the same conscientious Claim. When therefore it is decided, that a Purchaser is not affected by Notice of Claims under a voluntary Settlement, as it is not against Conscience for the Purchaser to take, it cannot be against Conscience for the Vendor to sell. The Effect of that Case is, that a voluntary Conveyance has no Value in Contemplation of Equity; and *Parry v. Carwarden* (*b*) is another Case, leading to the same Conclusion. The Consequence is, that a Court of Equity will not interpose for the Protection of any Interest under a voluntary Settlement, to execute Articles, or give any Aid to Persons claiming under a voluntary Settlement, so as to prevent a Sale by the Author of it.

Sir Samuel Romilly, and Mr. Haslewood, for the Plaintiff.

A Court of Equity will prevent a Man, having made such a voluntary Settlement upon his Wife and Children, from disappointing it. In the Cases cited an actual Sale

(*a*) 2 Bro. C. C. 148.

(*b*) 2 Dick. 544.

had

had taken place; and the Contest was between an actual Purchaser and those, who claimed under the voluntary Conveyance: but the Question here is, whether this Court will give to a Person, who has now no Equity, an Equity against the Wife and Children; whether the Husband and Father shall be enabled to create such an Interest in some Person for the mere Purpose of disappointing the Settlement. The Objection, that, if the Purchase is not against Conscience, the Sale cannot be unconscientious, is answered by the Act of Parliament (a) positively declaring a voluntary Conveyance void against a Purchaser; not therefore involving any Question of Conscience. Here is no Person, who has a Right to call for the Benefit of that Statute. It is surely a most unconscientious Act in a Man, having settled an Estate upon his Wife and Children, to sell, and take the Money himself; though it may not be unconscientious to propose to purchase, if a good Title can be made.

There are many Instances of a good Consideration supported and aided in Equity. *Villers v. Beaumont* (b). *Brookbank v. Brookbank* (c). The Tendency of the modern Cases is, that the Decisions upon this Statute have gone sufficiently far; and their Effect in defeating such Settlements is not to be extended: *Doe*, on the Demise of *Watson v. Routledge* (d). *Roe*, on the Demise of *Hamerton v. Mitton* (e). The Right to Dower, or a Jointure given up, has been held a valuable Interest, preventing the Effect of this Statute; and the Court does not enter into the *Quantum* of the Consideration: *Scott v. Bell* (f). *Lavender v. Blackstone* (g). In *Ellis v.*

(a) Stat. 27 Eliz. c. 4.

Vol. II. 410, in *Middleton v.*

(b) 1 Vern. 100.

Lord Kenyon.

(c) 1 Eq. Ca. Ab. 168.

(f) 2 Lev. 70.

(d) Cowp. 705.

(g) 2 Lev. 146.

(e) 2 Wils. 356. See *Ante*,

-G 4

Ellis,

1811.

FULVERTOFT

v.

PULVERTOFT.

1811.

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PULVERTOFT

v.

PULVERTOFT.

Ellis (a), and *Roberts v. Roberts (b)* the Husband was restrained from assigning the Wife's Property, thereby defeating her Right to a Settlement. A Contract would be enforced in Favor of a Wife and Children: but the Jurisdiction becomes nugatory, if the Husband by creating an Interest in a third Person can defeat his own Act. Admitting, that the Right of a third Person, claiming either by Conveyance or Contract the Benefit of this Statute, would prevail, the Question is, whether a Court of Equity will permit the Husband to create such an Interest, which does not yet exist, and thus defeat the Act, by which he had discharged the moral Obligation to provide for his Family. The Consequence of dissolving the Injunction in this Stage of the Cause must be a Decision against the Relief under this Settlement without a Possibility of Appeal: a Consideration, which will induce the Court to admit a short Delay by continuing the Injunction until the Hearing.

Mr. Leach, in Reply.

The Observations, upon these Statutes, and the Distinctions with reference to the Nature of the Settlement, as merely voluntary, upon good Consideration, or fraudulent, and the Object, as affecting Creditors, or Purchasers, have been made in all Times; and are to be found in many Cases; which are collected, and fully considered in *Doe, on the Demise of Otley v. Manning (c)*: but the Construction

(a) 1 Sup. *Vin.* 475.(b) 1 Sup. *Vin.* 476.

(c) 9 *East.* 59. *Hill v. The Bishop of Exeter*, 2 *Taunt.* 69. The Courts, conceiving the Weight of Authority to be in Favor of

the Conclusion, that a Settlement, merely voluntary, without actual Fraud, is void against a Purchaser, have expressed Regret, that it has been extended to a Purchaser with Notice: a Conclusion,

struction upon the latter Statute, which must be the same at Law and in Equity, is now settled; that all Conveyances merely voluntary are void against a subsequent Purchaser for valuable Consideration. Upon that well established Rule your Lordship will not again throw a Doubt by sustaining this Injunction; attending to Lord Thurlow's Observation in *Evelyn v. Templar* (a), that so many Titles stand upon this Rule, that it cannot be shaken. That Case was decided upon a Principle conclusive as to this: the Purchaser having Notice of the Claim; who, if the Vendor has no Right to sell on account of that Claim, must be equally affected; as he can never take Advantage of a Fraud, to which he is a Party. The plain Consequence of this settled Rule of Construction is, that notwithstanding a voluntary Conveyance the Grantor has a Right to sell the Estate, as if he had expressly reserved that Right. All the Authorities may be reconciled upon that Principle; and there is no other Way of reconciling them. Every Person must be taken to know, that by

Conclusion, that seems equal-
ly inconsistent with the Letter and Spirit of the Act, and with Reason. Perhaps, as a general Presumption in Favor of a Purchaser without Notice, the Inference of a fraudulent Purpose of subsequent Sale may not be unreasonable; open however to the Effect of Time and other Circumstances; and may be sufficient to meet the Observation upon the penal Clause, and the Exception of Conveyances for good Consideration and *bona fide*

; if upon the Context that is to be construed other than valuable: but an Attempt to defeat a fair Family Settlement is a Fraud, of another Description, and upon other Parties, than those the Statute points at; and a Purchaser with Notice, joining in such a Design, can hardly be represented as the Person, free from Imputation, “*for the Intent and of Purpose to defraud and deceive*” whom the Act was done.

(a) 2 Bro. C. C. 148.

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~~
PULVERTORT
v.
PULVERTORT.

Law

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v.

PULVERTOTT.

Law he has that Power; and therefore it is unnecessary to reserve it. The Case of *Parry v. Carwarden* (*a*) leads to the same Conclusion; that the Grantor in a Conveyance merely voluntary, has still a Right to sell; and a Purchaser by Articles under such Circumstances that a Court of Equity will give them Effect is equally a Purchaser in Equity, as he would have been by Conveyance at Law. The Case of *Holford v. Holford* (*b*) confirms that Proposition, that a Court of Equity will entertain a Suit for the Performance of a Contract by Articles against Claims under a voluntary Conveyance: an Issue being directed, to determine, whether the Defendant was a Person claiming under a Conveyance fraudulent according to the Construction of the Statute, the Conclusion is, that, if he proved to be so, the Contract would be executed against him: but it was not executed, as the Jury found, that the Conveyance was not void under the Statute. The Cases upon the Wife's Property and her Right in Equity to a Settlement have no Application to this Subject.

The Lord CHANCELLOR.

Limitation to
Brothers or
other Relations
within the
Consideration
of a Settlement,
and therefore
not voluntary.

The Object of that Inquiry in *Holford v. Holford* was to ascertain, whether the Brother of the Father was under the first Settlement a mere Volunteer; as, where the Limitations extend to Brothers, or other Relations, all within the Consideration, those are not Cases of voluntary Settlement.

It is too late to dispute, that, if a Settlement, though for good Consideration, is voluntary, as between the Persons, claiming under it, and a Purchaser, though with Notice, the Purchaser will hold the Estate. It is true, the Construction, put upon both these Statutes, is singular; that a Man, paying, what in other Cases is called

(*a*) 2 Dick. 544.

(*b*) 1 Ch. Ca. 216.

an Obligation of Nature, should be considered as within the Penalties of these Acts. I remember, I think, all the Cases, that have occurred in the Courts of Justice for the last Thirty Years upon this Point: I have also had considerable Information from others, carrying my Acquaintance with it back to the Distance of Half a Century; and after granting this Injunction I felt extremely uneasy; as having taken a Step, that I believe was never before asked from a Court of Justice: recollecting also the Struggle of late against the Doctrine upon the Construction of these Statutes, and Lord *Thurlow's* Opinion on the Case (a) I argued, that the Money could not be laid hold of, it seems almost impossible to conceive, that, if Courts of Equity had this Jurisdiction, there would not have been found considerable Authority, leaving no Doubt upon it at this Day.

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PULVERTOFT  
v.  
PULVERTOFT.

Purchase-money cannot be laid hold of in favour of Claims under a previous Settlement void under the Stat.

I have not had an Opportunity of looking through the Cases so thoroughly as I wish: but upon examining the Case of *Evelyn v. Templar* in my own Book I find the printed Note very imperfect; and I believe this very Point was much discussed there. In *Leach v. Dean* (b), which was referred to in that Case, it does appear from another very imperfect Report, that this Court did lay hold of the Money, and I stated that to Lord *Thurlow*, as a Ground for his Interposition in a Case, much stronger than the common Case, an actual Covenant, that, if he did sell, he would settle the Money to the same Uses; and in all these Cases, whether there should be such Covenants, or not, there are, generally, Covenants for the Title, upon which the Value of the Estate might be recovered at Law: but there are many Cases of that Kind, where, if purely voluntary, this Court would not do any thing upon such a Covenant.

27 Eliz. c. 4.  
as being voluntary.

(a) 2 Bro. C. C. 148.

(b) 1 Ch. Rep. 78.

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PULVERTOFT

v.

PULVERTOFT.

Articles executed against a voluntary Settlement.

Consideration of Marriage considered as extending to Persons not directly within it; viz. to Brothers, Uncles, and other Relations, upon the Marriage of a Son; as within the Contract between him and his Father.

Voluntary Settlement good between the Parties.

The Case of *Holford v. Holford* (*a*) I dare not rely upon without looking more into it. If it was a Decision, that this Court will not execute Articles against a voluntary Settlement, it contradicts a much later Case, in *Dickens* (*b*), and others, where this Court has executed Articles against a voluntary Settlement. For another Reason also I would not decide upon that Case without examining the *Register's Book*, on account of the Case of Persons, not within the Consideration directly; but who have been always so considered; preventing the Effect of these Statutes. In the Case, for Instance, of a Father, Tenant for Life, with Remainder to his Son in Tail, they may agree upon the Marriage of the Son to settle, not only upon his Issue, but upon the Brothers and Uncles of that Son; and the Question would be, whether they, though not within the Consideration of the Marriage, are not within the Contract between the Father and Son: both having a Right to insist upon a provident Provision for Uncles, Brothers, Sisters, and other Relations; and to say to each other, "I will not agree, unless you will so settle." The Court has held such a Claim not to be that of a mere Volunteer; but, as falling within the Range of the Consideration; and therefore these Statutes would not bear upon it.

The Case of *Brookbank v. Brookbank* (*c*) bears much upon the Point. It is clear, that a voluntary Settlement is good between the Parties. I wish also to look at that Case in the *Register's Book*. If it was no more than a voluntary Settlement by the Father and Son, and upon

(*a*) 1 Ch. Ca. 216.

(*b*) *Parry v. Carwarden*, 2 *Dick.* 544. It was said, that from the *Register's Book* it appears, that the Court di-

rected the Money to be laid out upon the Trusts of the Settlement; and it was afterwards compromised.

(*c*) 1 Eq. Ca. Ab. 168.

Failure

Failure of Issue the Father wished to part with the Estate, and the Uncle filed a Bill to have the Deed brought into Court, first, I doubt extremely, whether the Uncle would be entitled to that; as the Son himself would not have been entitled to have the Deed brought into Court. Next, I cannot agree, that, if the Deed had been brought into Court, it would have prevented a Sale by the Father, if that was a voluntary Settlement. The Answer would be, that the Deed, though brought into Court, being no more, the Purchaser, getting the prior Title Deeds, would have been safe.

With regard to the Cases (*a*) cited as to the Wife's Property, it is now very well understood, that the Doctrine, resulting out of those Cases, will not apply to such a Case as this; and many of them would not at this Day be held to be Law, as applying to her Property: but, if Lord *Thurlow* did not think himself authorised to lay hold of the Money in *Evelyn v. Templar*, where there was Notice, and an express Covenant to lay out the Money to the same Uses, I must take his Opinion to have been, as I believe it was, that with a mere voluntary Settlement this Court has nothing to do.

Another Circumstance has been suggested; that this is not a voluntary Settlement, with reference to the Wife giving up her Dower. With regard to the Fact, Estates are so involved with Trusts, that in very few Cases is the Wife entitled to Dower. That however may be the Subject of Inquiry: but upon the general Point my Opinion is, that I ought not to have granted this Injunction; and I was extremely uneasy afterwards, reflecting upon it.

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Court of  
Equity will not  
act in favour  
of a mere vo-  
luntary Settle-  
ment; and  
therefore upon  
a subsequent  
Purchase with  
Notice and Co-  
ovenant to lay  
out the Money  
to the same  
Uses, will not  
lay hold of the  
Money.

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The Order was made, dissolving the Injunction.

(*a*) *Ellis v. Ellis, Roberts v. Roberts*, 1 Sup. *Vin.* 475, 6.

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*The*

1811.

PULVERTOFT

v.

PULVERTOFT.

June 29.

*The Lord CHANCELLOR.*

I have read the Settlement in this Case; and desire it to be understood, that I give no Opinion whatsoever, whether this Settlement was, or was not, voluntary; being apprehensive, that, refusing the Injunction I should be considered as intimating an Opinion, that the Purchaser would have a good Title. If this is a voluntary Settlement, I cannot grant the Injunction. If it is not a voluntary Settlement, I cannot for that mere Reason grant the Injunction; as the Effect would be, that any Person, who conceived himself to have a better Title than another, might come into this Court for an Injunction. I cannot therefore support the Injunction, whether the Settlement is voluntary, or not: but I intimate no Opinion, whether the Purchaser will have a good Title, or not.

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The Injunction being dissolved, the Defendant put in a Demurrer.

Nov. 19.

Mr. Leach, and Mr. Wakefield, in support of the Demurrer, referred to the former Argument, and the late Case of *Otley v. Manning* (a), collecting all the Authorities; and observed, that this was merely a Re-hearing of the Order, dissolving the Injunction.

Sir Samuel Romilly, and Mr. Haslewood, for the Plaintiff.

The Case of *Otley v. Manning* has no Application. A clear Equity appears upon the Face of this Bill, derived from the last Settlement; under which the Estate now stands limited, first, to the separate Use of the Wife for Life; with Remainders to the Husband for Life, and

(a) 9 East. 59.

to

to the Children; and the Bill is filed against the Husband and the Trustees; alledging, that he is about to sell the Estate, but also praying, that the Trusts may be established. No Doubt can be suggested upon the Jurisdiction in a Court of Equity, until he has by a Sale made a Conveyance to another Person for valuable Consideration. Until that is actually done, the Wife has a clear Right to have it secured for her Benefit. Admitting this to be a voluntary Conveyance, to which a Court of Equity will not give any Assistance, the Question is, whether the Court will restrain the Husband from revoking it by conveying to another Person for valuable Consideration. The Opinion, which the Court has expressed, that he may do so, gives the Statute of *Eliz.* an Effect, which it has never yet had: though as against a Purchaser for valuable Consideration, even with Notice, it is admitted, that the most meritorious voluntary Settlement is void. The Result of *Otley v. Manning*, in which Case all the Authorities were considered, and their Force compared, is, that the Object of the Legislature was to make such a Settlement void in all Cases against a Purchaser on account of the Inconvenience, attending the Question of Notice; leaving him at Liberty to revoke the Conveyance he had made: but the Intention to protect Purchasers did not extend to denying Assistance to Parties, claiming under a Settlement upon good, meritorious, though not valuable, Consideration.

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PULVEREATOR

v.

PULVEREATOR.

The Principle, upon which the Determinations at Law upon this Statute have gone, being, that it is not safe or convenient to leave the Right to fluctuate upon the Point of Notice, considering the Effect of deciding in Equity against the Interests under the Settlement, where no Person except the Husband stands in Competition with them, Courts of Equity have so far followed the Law as to consider a Person, contracting for the Purchase

1811.

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**PULVERTOFT**

*v.***PULVERTOFT.**

chase of an Estate without Notice of a voluntary Settlement, as if he had a Conveyance ; giving him therefore a specific Performance : but there is no Instance of aiding a Husband to undo a voluntary Settlement, made without Fraud ; and Mr. Sugden in his excellent Work notices a Decision (*a*) by the present *Master of the Rolls*, refusing to the Husband a specific Performance of such a Contract. If the Court will not give the Husband Assistance to undo the Settlement, it is but one Step farther to restrain him from entering into a Contract, which may be the Means of revoking it. In *Colman v. Sarrel* (*b*) Lord Thurlow took the Distinction, that a voluntary Deed, upon a meritorious Consideration, as a Provision for a Wife or Child, shall be executed. If therefore this rested in Articles, the Wife would have had a specific Performance against her Husband ; and a necessary Consequence is, that the Court, enforcing the Contract, will take Care, that it shall be executed effectually against him in her Favor

There are other Cases, having Analogy to this : *Ellis v. Ellis* (*c*) ; a Decision of Lord Loughborough, upon the Bill.

(*a*) *Burke v. Dawson*, at the *Rolls*, Michaelmas, 1805, Sugd. Law of Vendors and Purchasers of Estates, 439, Ed. 2.

(*b*) 3 Bro. C. C. 12. *Ante*, Vol. I. 50.

(*c*) 1 Sup. *Vin.* 475. 6th March, 1794, cited from a Manuscript Note by Mr. Abbott, the Speaker of the House of Commons.

The Plaintiff, a married

Woman, entitled to Money, in the Funds, filed the Bill to restrain her Husband from assigning, and to compel him to make a Settlement.

Mr. Scott, for the Plaintiff, said, that the Court would restrain the Act, which would have the Effect of destroying the Plaintiff's Equity against her Husband, which would not prevail against his Assignee ; and it is not true, that

**Bill of a married Woman, restraining her Husband from assigning her *Chose en Action*, a Legacy; as she would have been deprived of her Right to a Settlement: the Law not being at that Time understood, as it has been since settled (a), that the Assignee would be equally liable to her Equity.** In *Roberts v. Roberts* (b) a similar Injunction was granted by Lord *Alvanley*, sitting for the *Lord Chancellor*: expressing a strong Opinion, that the Assignee also would be compelled to make a Settlement: and that this is not new Doctrine appears from *Winch v. Page* (c). The Principle, on which these Cases were decided, that the Equity against the Husband would have been lost by the Assignment, has direct Application. At this Moment no one has any Interest against this Settlement except the Husband; and the Statute certainly was not made for his Protection, or to give him the Right to revoke the Settlement.

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*PULVERTOFT**v.**PULVERTOFT.***Mr. Leach, in Reply.**

After the Decisions, that have taken place, the Court cannot with any Consistency interpose against the Husband's Right of Alienation. The Case of *Ellis v. Ellis* turned upon its particular Circumstances: the Wife entitled to Stock, vested in the Name of a Trustee, and the Husband about to alien, it was conceived, that the As-

that the Court will interpose only where the Husband comes into Equity; as it will against his Suit in the Ecclesiastical Court; citing *Tothill*. (See *Mealis v. Mealis*, *Ante*, Vol. V. 517, note (a).) Lord *Loughborough*, C. continued the Injunction; and directed

the Husband to lay a Propo-sal before the Master.

(a) *Wright v. Morley*, *Ante*, Vol. XI. 12, and the References.

(b) In *Chancery*, 1796, 1 Sup. *Vin.* 476.

(c) *Bunb.* 86.

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Parties, claiming under the Trust, the Remedies, to which they are entitled, while that Estate exists. The Distinction, to which I am now adverting, resembles that, which is acknowledged by this Court between the Cases, where a Party can bar by Fine, and where he is obliged to go through the Form of a Recovery.

This Point appears to me to be one of considerable Weight; and therefore, though I have formed an Opinion upon the other Question, I shall refrain from expressing it, unless I shall find myself justified by the Necessity of determining that Question.

The Lord CHANCELLOR afterwards upon the Point last suggested over-ruled the Demurrer, as covering too much; the Plaintiff until an actual Sale being entitled to an Execution of the Trust. His Lordship did not express any farther Opinion on the other Question (*a*).

(*a*) *Buckle v. Mitchell*, the following Case.

ROLLS.
1812,
Feb. 17.
March.



BUCKLE v. MITCHELL.

Voluntary Settlement, though free from actual Fraud, and meritorious, as a Provision for Relations, void against a subsequent Purchaser for valuable Consideration, with Notice, whether by Conveyance, or Articles.

Specific Performance decreed in the latter Case.

ber,

THOMAS PEACE, seised in Fee of the Improper Rectory of Rogate subject to an outstanding Mortgage for the Term of One Thousand Years, by Indentures of Lease and Release, dated the 9th and 10th of September,

as a Provision for Relations, void against a subsequent Purchaser for valuable Consideration, with Notice, whether by Conveyance, or Articles.

ber, 1793, in Consideration of the natural Love and Affection, which he had for his Sister *Mary Gardner* and for her Children *Ann Stevens*, *Frank Gardner* and *Harriet Gardner*, and in Consideration of Ten Shillings, granted the Rectory to *Sibthorpe* and *Daintry* in Fee, subject to the Payment of any Money, then due on any Mortgage of the Premises, and to all the Specialty and Simple-contract Debts then due, or to be due, from the said *Thomas Peace*, in Trust for the said *Thomas Peace* for Life, and after his Death, in case *Harriet Gardner* should survive him, to raise by Sale or Mortgage £500 for *Harriet Gardner*; with a *Proviso*, that she should not have that Sum, unless she should relinquish and give up to *Frank Gardner* her distributive Share in the personal Estate of *Thomas Peace*; and, subject as aforesaid, in Trust for *Frank Gardner* for Life, without Impeachment of Waste; then to secure to any Woman, whom he might leave his Widow, an Annuity of £40 for Life; with Remainder in Trust for the Children of *Frank Gardner* for such Estate as he should appoint, and in Default of Appointment for all his Children, as Tenants in Common in Fee; and, if he should die without leaving any Issue, in Trust for *Thomas Peace*, his Heirs and Assigns; with a Power to *Thomas Peace*, and after his Death for *Frank Gardner*, to sell for the Purpose of discharging any Mortgage or other Incumbrance upon the Premises; and a *Proviso*, that no Sale or Mortgage should be made for the Purpose of raising the £500, if *Frank Gardner*, his Heirs, Executors, or Administrators, or the Heirs, Executors, or Administrators of *Thomas Peace*, should within Twelve Months after his Death pay *Harriet Gardner* £500. On the 4th of October, 1794, £2678, the Amount due on the Mortgage, was paid to *Mary White*, the Assignee of the Mortgage Term, by *Sibthorpe* and *Daintry* by Direction of *Thomas Peace* with his Money; and the Term was assigned to *Andrews*, in Trust for

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*Peace*, and to attend the Inheritance. In 1794 *Frank Gardner* married *Elizabeth Winter*; and had Children by her *F. T. Gardner*, *E. M. Gardner*, and *L. S. Gardner*. *Harriet Gardner* married *Mitchell*. *Daintry* died on the 26th *June*, 1810. By Agreement in Writing, signed by *Peace*, and by *Andrews* on behalf of *Buckle*, in Consideration of £500, paid down, and of £6500 to be paid, *Peace* agreed to convey to *Buckle* the Tithes of divers Lands, Part of the Rectorial Tithes; and it was declared, that, if it should be impracticable to part with the Title Deeds by reason of the Trusts of a Settlement, voluntarily made by *Thomas Peace*, affecting the Tithes agreed to be sold and other Hereditaments, then *Buckle* should at the Expence of *Peace* accept attested Copies with a Covenant to produce Originals. *Thomas Peace* died on the 28th of *June*, 1810, intestate, leaving *Frank Gardner* his Heir at Law; who died on the 28th of *July*, 1810, intestate, leaving his Wife and Children surviving,

*Harriet Mitchell* took out Administration to *Peace*. *Buckle* filed this Bill against *Mitchell* and his Wife, *Sibthorpe*, the *Gardners*, and *Andrews*, for a specific Performance of the Agreement, and for Re-payment of his Deposit, if the Agreement could not be performed.

Sir *Samuel Romilly*, and Mr. *Courtenay*, for the Plaintiffs; Mr. *Hart*, and Mr. *Daniel*, for the Defendants, *Mitchell* and Wife.

The Question is, whether after a pure voluntary Settlement, in Favor of near Relations, void by the Statute (a) of *Elizabeth* against a Purchaser with or without Notice, a Contract for Sale can be enforced against the Parties, claiming as Volunteers under that Settlement. Though

(a) Stat. 27 *Eliz.* c. 4.

Doubts

Doubts have been at some Periods entertained, no Question can now be made as to the Construction of this Statute; that if after a voluntary Settlement, though for what is called meritorious Consideration, upon a Wife and Children, the Settlor for a valuable Consideration conveys to a Person, having full Knowledge of that Settlement, and that the principal Object of the Contract and Conveyance to him is the Destruction of the Settlement, as against that Person the Settlement is altogether void. That has been clearly decided by the Court of King's Bench in a very recent Case (*a*).

The Question in this Case goes beyond that; whether, no actual Conveyance being executed, a Court of Equity will enforce the Execution of it against the Parties, having the legal Estate under the prior voluntary Settlement. Upon that Subject there is no direct Authority: but it received much Consideration by the Lord Chancellor in a late Case, *Pulvertoft v. Pulvertoft* (*b*); the Injunction, which was granted in the first Instance to a Wife claiming under a voluntary Settlement, restraining her Husband from selling, being dissolved before Answer: the Court holding, that the Wife had no Equity to interpose against the Husband's Power of Disposition; and the Argument, that, though an actual Conveyance for valuable Consideration would destroy the Settlement, it had been decided, that the Purchaser, not having obtained it, could not have Assistance in this Court to enforce the Contract, had no Weight against the Defendant, the Husband, contending, that there was no Distinction upon this Statute between Law and Equity; that the Effect of the Contract in Equity was precisely the same as that of the Conveyance

(*a*) *Doe, on the Demise Exeter, 2 Taunt. 69.*  
*of Otley v. Manning, 9 East.*      (*b*) *Ante, the preceding*  
**59. Hill v. The Bishop of**      *Case.*

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at Law. The *Lord Chancellor* was on that Occasion reminded of the Cases of a Husband, restrained from assigning his Wife's *Chose en Action*, to prevent his defeating her equitable Right to a Provision, before it was decided, that an Assignee for valuable Consideration is bound equally with the Husband to make a Provision for her.

The Statute does not require an actual Conveyance to bring a Party within the Description of a Purchaser for valuable Consideration, to defeat a voluntary Settlement. From these Articles it appears, that all the Parties had the Settlement in View, as not standing in the Way. In *Leach v. Dean* (*a*) it does not appear, that there was direct Notice: but that is a distinct Decision, that a Person under these Circumstances is a Purchaser within the Statute. In *Douglasse v. Waad* (*b*) the Jointress had no legal Remedy; and the Court interfered in Favor of her Right against a Settlement upon the most meritorious Consideration, but in Law voluntary. This Plaintiff is not attempting to take the legal Estate out of any one; but insists upon a superior Equity. In this Court the Contract upon valuable Consideration has all the Effect, which an actual Conveyance would have at Law; passing all the Interest in Equity. It is evident upon the Face of this Settlement, that the Parties contemplated the Case of a Sale to take place of it; giving a Power of Sale for the Purpose of discharging any Mortgage or other Incumbrance; and the Settlement being subject to the Debts, not only then due, but also to such as he should at any Time during his Life contract. They also contemplated the Sum of £500 for *Harriet Gardner* as one of the Incumbrances, for which the Estate might be sold.

Mr. *Leach*, and Mr. *Roupell*, for the other Defendants, claiming under the voluntary Settlement.

(*a*) 1 Ch. Rep. 78.

(*b*) 1 Ch. Ca. 99.

This

This Settlement was made by a Man, unmarried, having no Children, subject to the Payment of his Debts, upon himself, for Life; and after his Death for his Sister's Children; and the Question is, whether a Court of Equity will compel the Trustees for those Persons to convey. The Application is to the Discretion of the Court; which cannot be complied with, unless the Contract, under which the Plaintiff claims, is under all the Circumstances, upon Principles of moral Obligation, such as ought to be enforced; entitling the Party, beyond his legal Remedy against the Assets, to the extraordinary, specific, Relief, to be obtained by the Interposition of this Court. A Conveyance for these near Relations is certainly upon good Consideration: but that Term, as used in this Statute, has been held to mean valuable: A provident Disposition of this Sort for the Benefit of a Family, clear of Fraud, undue Influence, or Surprise, is regarded in Law as binding the Grantor in every Court; placing the Property, which is the Subject of it, out of his Reach, and liable to no Change of Intention. Is a Court of Equity to be active against such Claims, not for the Purpose of relieving a Purchaser, or a Stranger, whose Interests can in no other Way be protected, but for one, who, rejecting the full Indemnity, which the Law affords, insists without any Reason, that the Person, who made this provident Settlement, is bound in Conscience to rob his Family of the Benefit he had conferred on them? If this particular Case has not yet occurred, a Court of Equity will not make a Precedent, so offensive to its Maxims. The Construction of the Statute, extending to Cases, not fraudulent, is necessary; or the Object must be defeated: which was to check the Evil, that after a voluntary Conveyance, passing the Estate, a Sale took place; and after the Death of the Vendor the Purchaser was affected. In a Court of Law it was difficult to establish strictly the Intention to defraud; which was therefore assumed in Favor

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of Purchasers; and that Principle, that a voluntary Conveyance was void against a Purchaser, being established at Law, was followed in Equity. In *Leach v. Dean* the Father, with whom the Purchaser made the Contract, could not set up against his own Agreement a Conveyance, made expressly to defraud that Purchaser. The Distinction was taken between the Party making, and those taking, under a voluntary Conveyance. The former was considered as between him and the Purchaser to have made it with the Intention to deceive: the others cannot upon any Construction be affected by Fraud. The clear Distinction between the Cases is, that constructive Evidence, which at Law prevails against the Party, making the Contract, is not in Equity to be extended to those, who claim under it. The Purchaser cannot in Equity, and against such Parties, say, the Object was to deceive him. A Court of Equity will not push the Construction of this Statute farther than is necessary; and the Objection is, that an adequate Remedy may be had at Law.

In the Case of *Douglasse v. Waad* (*a*) the second Wife was a Purchaser of the £300 per Annum, not only by the Portion, but also by the Act of Marriage; a Consideration, which could not be recalled. The Nature of the Consideration prevented its Return. She was consequently a Purchaser, whose Title was to be sustained against a Volunteer. In *Pulvertoft v. Pulvertoft* (*b*) the Lord Chancellor refused to interfere to prevent the Husband's Act: but that Case is no Authority in Favor of the Purchaser. A Court of Equity has no Jurisdiction to set up that, which the Statute has in positive Terms declared absolutely void: but under Circumstances, to which the Statute does not apply, how can these Parties be reached in Equity? This Bill does not assert, that the Sale was

(*a*) 1 Ch. Ca. 99.(*b*) The preceding Case.

under

under the Power, to pay off an Incumbrance: but the Object appears to have been to sell the whole, and put the Money in his own Pocket: an Act inapplicable to that Power; and calculated merely to defeat this Settlement, made many Years before, and standing upon not only meritorious, but valuable, Consideration. The original Object of the Act to relieve Purchasers, deceived by Fraud, has certainly been extended to Conveyances merely voluntary on account of the Difficulty of getting at the Facts, and establishing the Charge of Fraud: but such Settlements are never considered as simply void: being always established as good between the Parties, until Creditors or Purchasers appear. This Plaintiff, having entered into an executory Contract, with Notice, has no stronger Claim than a mere Volunteer. The Jurisdiction is wholly discretionary; depending upon the superior Equity; as either Case has, or wants, Fraud, Circumvention, Surprise, Inadequacy; the Circumstances, influencing the Court to grant a specific Performance, or to refuse it, leaving the Party to Law. In *Leach v. Dean* the Want of Notice is not alledged: which in this Instance does not rest upon Presumption, but is established by the direct Reference in the Contract to the Settlement, under the Apprehension, that they could not obtain the Title Deeds; which were in the Possession of the Trustees. So in *Douglasse v. Waad* nothing is said about Notice. *Pulvertoft v. Pulvertoft* was under different Circumstances: not a Purchaser coming for the Aid of the Court against a voluntary Settlement; but the Party claiming under that Settlement to restrain the Husband from doing what he might do by Law; for which Purpose the Court refused to interpose; leaving the Result of their Contracts and Rights to the Determination of the Law. Notice is of the utmost Importance. *White v. Hussey (a)* turned

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(a) Pr. Ch. 13.

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upon the Absence of Notice; and it is relied on by L Mansfield in *Doe on the Demise of Watson v. Ry ledge* (*a*). In *Bennet v. Musgrave* Lord Hardwicke presses himself strongly upon the Distinction between actual and presumed Fraud; that in the former Case a Purchaser for valuable Consideration may in this Court set aside a precedent voluntary Conveyance; but in the latter would be left to Law.

Sir Samuel Romilly, in Reply.

The true Question is, whether the Statute shall have a different Operation in Equity from that, which it has in Law. The Plaintiff, having a Contract, which cannot be disputed, has from the Moment it is signed an equitable Interest. This discretionary Power to grant a specific Performance has never been thus limited on the Ground that there is a compleat Remedy at Law: but a specific Performance may be compelled even of a Contract for Half the Value; as was said particularly in *Mortlock v. Buller* (*b*); unless nearly approaching to Fraud; in which Case the Court has remained neuter. The Construction of this Statute as to Notice was very questionable originally; and perhaps, had the Consequences been so seen, the Act would not have passed. In many Instances instead of preventing, it creates Fraud; depriving Persons of Estates, to which for Years they have been permitted to suppose themselves entitled, and to arrange their Property in Life accordingly. It is however too late now to propose any remedy that except by an Act of Parliament, declaring, that against a Purchaser with Notice such a Settlement shall not be void; which would perhaps be a very wise Provision. Every Argument applies equally to a Person, having an Agreement, as a Conveyance: otherwise the Con-

(*a*) Coup. 705.

(*b*) Ante, Vol. X. 292.
clus

cision must be, that the Construction is different at Law and in Equity. *Letch v. Dean*, has no Distinction, except that it is not ascertained, whether the Party had Notice; which can never be material in the Case of an executory Contract. A Person, claiming as a Volunteer under another, is in Equity precisely in the same Situation as the Party, under whom he claims, liable to every Objection and Equity. *Douglasse v. Waad*, also cannot be distinguished. It is said, upon that Case, that she could not be unmarried: but the Court has never gone upon that Distinction, whether the one Party had, or had not, the Means of repaying the other; who might lose by not carrying the Agreement into Execution. There must be some general Rule, depending upon the Construction of the Act, not the Possibility of getting back the Purchase-money. In *Pulvertoft v. Pulvertoft* the Point decided was not the same; but went much farther, and could not have been determined, as it was, unless the *Lord Chancellor* conceived, that the Court ought to give the Relief, prayed by this Bill; depending upon the Right of the Husband, if he pleases, to undo that, which he has done; to act upon the Estate by Sale, as if he remained absolute Owner. If the Court would not in that Case interfere by Injunction to prevent the Destruction of the Settlement, is not the Person, contracting with him as such absolute Owner, entitled to have the Contract carried into Execution? The *Lord Chancellor* cited from a Manuscript Note the Case, in which the Court refused to compel the Husband, having after a voluntary Settlement, contracted to sell, to settle the Purchase-money to the same Uses; conceiving, that there was no Equity to affect the Purchase-money, after the Estate was sold. In *Burke v. Dawson* (a), the Court would not compel the

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(a) At the Rolls, 1805. Sugd. Law of Vendors and Purchasers, 439.

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Execution of a Contract by a Husband, having made voluntary Settlement, against the Purchaser. *Parry v. Carwarden (a)*, and *Orleigh v. Lee (b)*, are not directly applicable, from the Want of Notice.

1813,
March.

The MASTER of the ROLLS.

The Objection to the specific Performance, prayed for by the Bill, is made by those, who claim Interests under the voluntary Settlement, executed by the Vendor of the Estate.

It must, I conceive, be assumed, that the Statute of the 27th of *Elizabeth* has now received this Construction that a voluntary Settlement, however free from *actus Fraud*, is, by the Operation of that Statute deemed fraudulent and void against a subsequent Purchaser for valuable Consideration, even when the Purchase has been made with Notice of the prior voluntary Settlement. I have great Difficulty to persuade myself, that the Word of the Statute warranted, or that the Purpose of it required, such a Construction: for it is not easy to conceive how a Purchaser can be defrauded by a Settlement, of which he has Notice, before he makes his Purchase. But it is essential to the Security of Property, that the Rule should be adhered to, when settled; whatever Doubt there may be as to the Grounds, on which it originally stood. The Statute must receive the same Construction and produce the same Effect, in a Court of Equity as in a Court of Law. The Purchaser of an equitable Estate for a valuable Consideration, ought no more to be affected by a voluntary Settlement than the Purchaser of a legal Estate. A Contract for a Purchase is an equitable Title

(a) 2 *Dick.* 544.(b) 1 *Atk.* 625.

and the Party, having such Title, is in equity to most Purposes considered as the compleat Owner of the Estate. It is true, that Equity does not in every Case lend its Aid to carry a Contract for a Purchase into Execution: but it does not arbitrarily execute one Contract, and refuse to execute another. Some Ground must be laid to prevent the Party from obtaining, in his Case, the Assistance which the Court usually gives in Cases of the same general Description.

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Equitable Discretion to lend or refuse Aid to execute a Contract for Purchase not arbitrary.

Then the Question is, whether the Existence of a prior voluntary Settlement be a sufficient Ground to induce a Court of Equity to refuse to compleat a Contract in favour of a Party, who has Notice of such Settlement? If a Settlement were shewn to be really fraudulent, in the ordinary Acceptation of the Word, I presume it would not be contended, that the Court would, out of regard to such Settlement, refuse to give to a Party, purchasing with Notice of it, the Benefit of his Contract: but it is said, that voluntary Settlements are often made upon laudable and meritorious Considerations; and that a Court of Equity ought not to be instrumental in defeating such as are of that Description. But is not this an Assumption, which the Statute, according to the Construction it has received, does not permit us to make? Considering the Party, contracting for a Purchase, as in equity a Purchaser, the Statute, as construed, says, that the Settlement, set up against him, is merely a fraudulent Device to cheat and impose upon subsequent Purchasers. Is the Court to say, that because of that fraudulent Device it will refuse to act in favour of a Purchaser, who stands in need of its Interposition? The Statute, as it has been construed, says, that a Purchaser, who has Notice of a voluntary Settlement, has Notice not of a Title, but of a Nullity and a Fraud. How then can a Court of Equity say, that it is unconscientious in a Person, having such Notice,

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Notice of the Contents of a voluntary Settlement has no Effect even in Equity: therefore Notice of a Covenant in a voluntary Settlement, that the Purchase-money should be paid to Trustees, to be laid out in other Lands, to be settled to the same Uses, held immaterial.

No Equity under a voluntary Settlement to prevent a Sale.

Notice, to enter into a Treaty for a Purchase, when it is bound to say, that there is nothing unconscientious in his taking a Conveyance of the Estate? In *Evelyn v. Templar* the Circumstance of the Purchaser's having Notice of a Covenant in a voluntary Settlement, that the Purchase-money should be paid to Trustees to be laid out in other Lands, to be settled to the same Uses, was held to be immaterial. As it is clear, that he would have been affected by Notice of such a Covenant in a Deed for a valuable Consideration, the Case proves, that in Lord Thurlow's Opinion Notice of the Contents of a voluntary Settlement has no Effect even in a Court of Equity.

In *Pulvertoft v. Pulvertoft* the present *Lord Chancellor* has held, that even before any third Person has acquired an Interest in the Property, voluntarily settled, and when the Matter rests entirely between the Grantor or Grantee, the latter has no Equity to prevent the former from defeating the Grant by a Sale of the Estate. It would be a strong Thing then to say, that he has an Equity after the Estate is contracted for, and after a third Person has acquired an Interest in it, to prevent that third Person from obtaining the Benefit of the Contract, which the Court would not restrain the Settlor himself from entering into.

The Case of *Leach v. Dean* is a very material one; and seems to be a direct Decision on the Point. It is true, no mention is made of the Purchaser's having had Notice of the voluntary Settlement, before he entered into the Agreement: but, in the first Place, it being now settled, that according to the true Construction of the Statute a voluntary Settlement, of which a Purchaser has Notice, is as against him just as fraudulent as one, of which he has no Notice, the Difference seems to be immaterial.

material. In the second Place, the Purchaser had Notice, before he had either paid his Purchase-money, or got his Conveyance. If Notice were material, it came in sufficient Time: yet the Court with full Knowledge of the Settlement went on, and executed the Contract. The same Observation applies to *Parry v. Carwarden*; where only £10 of the Purchase-money had been paid, before the voluntary Settlement was set up. It was said in the Argument, that in *Leach v. Dean* the Settlor was before the Court; and he could not avoid the Performance of the Contract by setting up his own voluntary Deed: but the Settlor's being before the Court could not at all affect the Case of the Son, who was also before it. It was necessary to decide, whether his Interest under the Settlement should prevent the Court from decreeing a specific Performance against the Father. Accordingly the Court first considers, how the Case stood with respect to the Father; and secondly with respect to the Son: and decided, that the Case of the Son was not distinguishable *quoad hoc* from that of the Father; which was deciding, that the Grantee in a voluntary Settlement has no more Right than the Grantor to object to the Completion of a Contract for the Sale of the settled Estate.

I shall conclude with observing, that as in this Case the legal Estate is in Trustees, the Question comes to be, which Party has the best Right to call for a Conveyance of it. For the Reasons I have already given I think it is the Purchaser; and therefore the Decree must be in his Favour.

As to Mrs. Gardner's Annuity, it is said to be for a valuable Consideration: but if there be any valid Incumbrances on the Estate, a Decree for a specific Performance will not at all affect them.

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1811,
June, 27.

ERSKINE v. GARTHSHORE.

Any Proceeding may be referred for Scandal and Impertinence; as a State of Facts before the Master, and Affidavits in Bankruptcy.

A MOTION was made to refer for Scandal and Impertinence a State of Facts, laid before the Master.

Sir *Samuel Romilly*, and Mr. *Bell*, in support of the Motion, referring to *Coffin v. Cooper* (a), contended, that a State was as open to this Reference as any other Proceeding.

Mr. Hart, against the Motion.

This is a Proceeding required by the Master merely for his own Satisfaction upon a Point, which the Party is to maintain: it may be received, or not, according to the Master's Discretion: the Interposition of the Court is therefore unnecessary; as the Master is competent to controul any Abuse. No Instance is produced; and such a Precedent will produce much Inconvenience. There is a wide Distinction between a State of Facts, brought into the Master's Office, and a Pleading; which ought to contain no Reasoning; as a State of Facts may; the Office of which is to apprise the Master of all the Facts and the Nature of the Case.

Sir *Samuel Romilly*, in Reply, observed, that, if the Master rejected the State of Facts, the Party would have no Remedy for the Expence of taking a Copy; and insisted, that there is no rational Distinction between this and any other Proceeding, affected by Scan-

(a) *Ante*, Vol. VI. 514.

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dal and Impertinence ; for Instance, Affidavits in Bank-
ruptcy.

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I have had Occasion formerly to look into this Subject, not with reference to this particular Proceeding, but upon Affidavits in Bankruptcy, and I am perfectly satisfied, that there can be no one Proceeding before this Court, which, if made the Vehicle of Scandal and Impertinence, this Court will not examine with the View to reform it. A State of Facts, carried in before the Master, is in Truth carried in before the Court ; of which the Master's Office is Part : it contains all the Points, supposed to be put in Issue, to be proved before the Master ; and are Persons under that Colour to be libelled without the least Reference to the Subject of the Suit ?

The Order was made.

HOLTZAPFFEL v. BAKER.

1811.

June 20.

July 1.

BY an Agreement, signed by the Plaintiff and the Defendant, and dated 31st May, 1803, the Defendant agreed to let to the Plaintiff a Messuage and Workshops, and Premises, in *Long Acre*, for Nine Years and an Half, at the yearly Rent of £70, payable quarterly, No Equity in favor of a Lessee of a House, liable to repair with the Exception of Damage by Fire, for an Injunction against an Action under the Contract for Payment of Rent upon the Destruction of the House by Fire.

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on the usual Days ; and the Plaintiff agreed to take the said Messuage and Premises upon those Terms, and " to pay the yearly Rent thereby reserved on the Days and Times and in Manner before mentioned." The Plaintiff also agreed to repair the Premises, and keep them in Repair, reasonable Use and Wear and Damage by Fire excepted. The Rent was regularly paid to *Michaelmas*, 1809. On the 15th *January*, 1810, the Premises were totally consumed by Fire, and reduced to a State of Ruin, so that the Plaintiff had been since entirely deprived of the Occupation and Use of them.

The Defendant having brought an Action against the Plaintiff for a Year and an Half's Rent, from *Michaelmas*, 1809, to *Lady-day*, 1811, the Plaintiff filed his Bill, praying, that the Defendant might rebuild the Premises, and for an Injunction against Proceedings at Law for recovering Rent from *Christmas*, 1809, until the Premises should be rebuilt ; or that the Defendant might accept a Surrender of the Agreement, and in that Case, for an Injunction against recovering Rent from *Christmas*, 1809 ; the Plaintiff in the latter Case, offering to surrender the Agreement and all his Estate and Interest therein ; and in both Cases, offering to pay the Quarter's Rent from *Michaelmas*, 1809, to the *Christmas* following. The Plaintiff having obtained an Injunction against the Action, for want of an Answer, the Defendant on the coming in of the Answer, moved to dissolve the Injunction.

The Action was tried, before the Motion was disposed of; and the Landlord obtained a Verdict,

Mr. Richards, and Mr. Roupell, in support of the Motion to dissolve the Injunction.

In the Case of *Hare v. Grove* (*a*) *Brown v. Quilter* (*b*) and all the preceding Authorities were reviewed; and upon full Consideration the Court of *Exchequer* decided, that, as there was no Defence against an Action, so the Tenant has no Remedy in Equity against the Effect of the substantive, independent, Covenant to pay the Rent during the Term. *Brown v. Quilter* does not decide the Point; though certainly Lord *Northington* expressed his Opinion, that, the Covenant for quiet Enjoyment, though it did not oblige the Landlord to rebuild, afforded a Ground for an Injunction, until the House was rebuilt. The Landlord had insured; and had actually received the Amount of that Insurance; which might perhaps be considered as affecting his Conscience, and taking the Case out of the general Rule. In this Instance there was no Insurance; and, the Equity being equal, as the *Chief Baron* observes, the Rule of Law must prevail. There is no Distinction between this and the Case in the Court of *Exchequer*, which is the last Decision, and never contradicted, except the Circumstance of the dangerous Use, to which in that Instance the House was applied; a Circumstance, which the Court considered immaterial.

Sir Samuel Romilly, and Mr. Treslove, for the Plaintiff.

That Case certainly very much resembles this; but it is a single Decision of the Court of *Exchequer* against Three in this Court; and the Reasoning is not very satisfactory. Some Points of Distinction however may be observed. This is, not a Lease under Seal, with a distinct Covenant for the Rent, but an Agreement to let for Nine Years and an Half from the preceding *Lady-day* at the yearly Rent of £70; and the Tenant agreeing to take the Premises, and pay the Rent, must be understood as under-

(*a*) 3 *Anstr.* 687.

(*b*) *Amb.* 619.

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taking that, having the Enjoyment of the Premises. This Equity is supported by Three Authorities, Two by Lord *Northington*, and One by Lord *Bathurst*. *Brown v. Quilter* certainly is not a Decision: the Tenant, refusing to give up the Lease, not being entitled to Relief: but Lord *Northington* expresses a clear Opinion in the Tenant's Favour. In *Camden v. Morton* (a) Lord *Northington* adhered to that Opinion; representing it as most unreasonable and unconscientious, that the Lessor should be paid for a House, the only Subject of the Demise, where the Lessee is prevented by the Accident of the Fire from enjoying it. Lord *Apsley* clearly decided this Point in the Tenant's Favour in *Steele v. Wright* (b). As to the Distinction, where the Landlord insured, and received the Value, it is extremely difficult to conceive, how that distinct Contract, merely for the Advantage of the Lessor, with which the Lessee has no Concern, can affect the Right as between them. It is manifestly against Conscience, that the Rent, stipulated for with reference to the Tenant's Enjoyment, which is the Consideration for it, the Tenant also expressly stipulating, that he shall not be bound to rebuild, should be demanded under these Circumstances. In *Brown v. Quilter* there was Land demised with the House: but the House is the only Subject of this Demise; and, the Parties looking to that alone, the Limitation of the Covenant to repair by the Exception of Damage by Fire may be considered as extending throughout the Contract. The Lord Chief Baron treats Lord *Northington's* Opinion, comparing the Effect of this Accident to an Eviction, as unsound. The Effect of giving this Relief will be to divide the Burthen; either com-

(a) Before Lord *Northington*. Cited from a MSS. of Serjeant *Hill* in the Library of *Lincoln's Inn*.

(b) Cited 1 Term Rep. 708, in *Doe v. Sandham*, as decided by Lord *Apsley*, in 1773.

pelling

pelling the Landlord to rebuild, or letting the Tenant give up the Lease.

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The Lord CHANCELLOR.

Some of the Fire-Offices reserve the Option of paying the Money, or laying it out themselves; which may make a considerable Difference; as that Option ought not to affect the Lessee.

For the Plaintiff.

That Option is reserved merely for their own Protection against Fraud; not for the Benefit of the Tenant.

Mr. Richards, in Reply.

At Law there is no Doubt; and where is the Equity? This is the Contract of the Parties. If it can be compared to Eviction, there is a Defence at Law. If the Premises were destroyed by the overflowing of a River, that was held by Lord Northington not to raise an Equity. Lord Northington's Distinction has no solid Foundation; and the last Case is a very solemn Decision upon a Review of all the Authorities and the Principles.

The Lord CHANCELLOR.

After so solemn a Determination of this Question, upon a Hearing, the Court ought to abide by it; and really I cannot perceive the Equity in this Sort of Case. Suppose a Demise for Seven Years, at a Rent of £100 per Annum, the Tenant to repair in all Cases except Fire, not to be liable in that Case, and the Landlord stipulating, that in case of Fire he will be content at the End of Seven Years to take the Land without the House: if they choose to make that Agreement, why should they not? These Parties have made that Agreement. If it can

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be maintained, that the Meaning of this Contract is, that, if a Fire should happen, the Rent shall not be paid, there is no Occasion to come into Equity: but, if that is not the Effect of the Contract at Law, I cannot see any Equity.

The Injunction was dissolved.

1811,

July 1, 2,

(and several

preceding

Days.)

Beneficial Contracts and Conveyances, obtained by an Attorney from his Client during their Relation, as such, and connected with the Subject of the Suit, being also liable to the Charge of *Champerty*, decreed to stand as Security only for what was ac-

WOOD v. DOWNES.

HERBERT Howarth died in 1745; having devised his Estates, subject to his Debts, to his Three Sisters, as Tenants in Common in Fee. The Plaintiff *Frances Wood*, his great Niece, by a Son of one of those Sisters, was his Heir at Law.

The Bill, filed by *William Wood* and *Frances*, his Wife, claiming in her Right as Heiress at Law and Devisee, prayed, that the several Contracts, Deeds, &c., executed by the Plaintiff *William Wood* and *Frances*, his Wife, to the Defendant, of any Right or Interest, belonging to them in the *Whitehouse* Estate, or other Property of *Herbert Howarth*, which purported to be an absolute Sale or Conveyance of any such Right or Interest to the Defendant, may be declared fraudulent as against the Plaintiff; and may stand as Security only for any Sums, actually due; and Purchases by the Attorney declared a Trust.

A subsequent Deed, not a separate, independent, voluntary, Transaction, but under the same Pressure, and called for under the Covenant for farther Assurance, no Confirmation.

that

that may appear to be due upon a general Account; and that the Purchase made, and Conveyances taken, from *George Pardoe and Somerset Davis* may be declared to have been taken in Trust for the Plaintiff; that an Account may be taken of all Sums, paid and advanced by the Defendant to the Plaintiff, and also of Sums expended by, or justly due to, the Defendant, for Fees, or otherwise, as Attorney and Solicitor, and of the Sums, paid to *Pardoe and Davis*, with Interest; an Account of the Rents received, and the Produce of Timber sold; and a Reconveyance.

The Bill charged, that the Plaintiffs were deceived by the Defendant; that the Conveyances were obtained by his Influence and Controul, while acting as their Attorney and Solicitor; that they were not acquainted with their Rights, the Nature and Value of the Estate, &c.; that Representations were made by the Defendant, that there was great Doubt, whether the Plaintiffs could recover the Estate; that the Price he gave was inadequate, and an Arbitration was made under his Controul and Management; that no Attorney was employed on behalf of the Plaintiffs in the Purchase by the Defendant; that his Purchases from *Pardoe and Davis* were made on behalf of the Plaintiffs; that *Pardoe's* principal Inducement was the Plaintiffs' Release of Demands upon him; and *Davis's* Inducement was, that the Right of the Plaintiffs would prevent his making his Security available; and the Defendant represented to them, that the Purchases were made on behalf of the Plaintiffs.

The Answer represented, that the Plaintiff, *William Wood*, being under great Anxiety, and very unwilling to embark at his own Risk in the tedious, expensive, and uncertain, Litigation, necessary for enforcing his Wife's Claims, the Agreement took place between him and the Defendant

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Defendant in *October*, 1789, contained in the Instruments of that Date: reciting, that the Plaintiff had applied to the Defendant to prosecute the Suits; to which he consented but, as the Subject was extensive and confused, and likely to be attended with great Difficulty and Expence, which the Plaintiff was not in a Situation to advance, &c.

The Answer farther stated, that afterwards, in 1790 upon Advice, that such an Agreement would be illegal they came to an Agreement for a Sale to the Defendant in Consideration of £100, then paid, and £1000 to be paid, as after mentioned, of the Plaintiff's One-third of the Estate; and the Conveyance was executed, and a Fine levied, accordingly. Another Conveyance was executed dated the 23d and 24th of *December*, 1791, after a Recovery in Ejectment in Right of the Plaintiff, and Possession taken under it, upon a Suggestion of Doubts of the Validity of the former Conveyance and Fine, the Plaintiff not having then recovered Possession, in consideration of the Sum of £1100 formerly paid.

The Answer denied the several Charges in the Bill as to the Purchases from *Pardoe* and *Davis*, and the alleged Imposition, Inadequacy, &c.; that the Defendant had any particular Knowledge of the Estate, that was not equally possessed by the Plaintiff; that the Defendant, though employed as the Plaintiff's Solicitor in making Inquiries relative to the Title prior to *January*, 1790, acted as Solicitor at the Execution of the Deeds; insisting, that the Plaintiff had full Knowledge; and the Contracts were perfectly fair, &c.

July 2.

The Lord CHANCELLOR after a most minute Statement of the Facts of this Case pronounced the following Judgment.

This

This is a Case of great Importance with reference to Persons, standing in the Relation of Attorney and Client (*a*). Taking the first of these Instruments either as an Agreement, entered into with the Defendant, a Solicitor, applied to to carry on the Suit upon the Part of the Plaintiff, and assuming, as I may infer, that this Deed would give the Defendant a Benefit of some Amount, regarding it as an Agreement executed between Attorney and Client, it could not have stood in a Court of Equity: it could not be enforced; and farther, upon the Doctrine of *Champerty* and the Cases upon buying pretended Titles, if the Defendant had not been the Attorney, it would be quite impossible, that a Court of Equity could permit this Deed to have any Effect. It is an Instrument equally inoperative both at Law and in Equity: no Covenant, contained in it, could be executed; and, whatever Effect it might have by Way of *Estoppel*, it could have none by Transmutation of Interest on both Grounds; as being liable to Imputation for *Champerty*, and also as a Deed obtained from a Client by an Attorney, beginning to carry on those Suits, the Effect of which was to be the Consideration for this Instrument.

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The subsequent Deed, of 1791, which is relied on as a Confirmation, clearly cannot have that Effect. If the Principles of a Court of Equity, not only with reference to the Law of Maintenance and *Champerty*, but also as arising out of the Relation of Attorney and Client, would not have permitted the original Transaction to stand, this subsequent Deed cannot have the Effect of doing away all the Objections. The Defendant is bound to an Admission, that the Deed of 1791 was called for by him under the Pressure of an Obligation, which he had a Right to call upon the Plaintiff and his Wife to fulfil; and the Deed re-

(*a*) *Gilson v. Jeyes, Ante, Vol. VI. 266.*

cites,

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cites, that he had called on them to fulfil their ~~Covenants~~ for farther Assurance; under which that Deed was ~~executed~~. This Deed, purporting upon the Face of it to have been executed expressly at the Instance of the Defendant in Discharge of a Covenant, which is not binding on the Ground of *Champerty*, or the Relation of Attorney and Client, must be taken to have been ~~executed~~ in consequence of a Covenant, having no binding Effect in Equity; and is therefore no Confirmation.

The Dates, with reference to the subsequent Transactions, are extremely material; and the Circumstances, under which the Residue of the £1000 was paid. Taking the Situation of the Plaintiff and his Wife, before any Instrument was executed by him, to be such as it is represented to be by the Answer, confirmed by the Representation in several of the Instruments, it was one, for a Suitor to be placed in, of as much Difficulty, as doubtful with regard to the probable Surplus, and as burdensome in Point of Expence, as can be conceived. He was upon the Representation of the Defendant himself not only placed under all those Difficulties, attending the Obligations resulting out of the Articles of 1787, and the Agreements of 1789 and 1790, when the Defendant became the Purchaser, but he had not the Means of successfully struggling with those Difficulties. He had at least by the Advice of his Solicitor fallen into a Situation, in which his original Difficulties were enhanced with all the additional Difficulties, resulting from an Obligation, conceived by himself and others to be ineffectual, but never admitted to be so by the Defendant; always on the contrary representing the Points, to which the Plaintiff's Attention had been drawn, as too absurd to be insisted on; the Difficulties from a Fine levied by his Wife, attending the Question, whether it was to operate by *Estopel*, or not, and from the Deed of 1791; which the Defendant

fendant cannot represent as an independent, detached, voluntary, Transaction. His Mouth is closed as to that; reciting, that he called for it; and called for it in Discharge of the Obligation, arising out of the Covenant for farther Assurance; which he represents himself entitled to, and determined to have.

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I have observed, that this Case appears to me as to be regarded in Two Points of View; the Transaction liable to Objections of Two Kinds: first, as bringing forward the Consideration of the Effect of a Bargain between an Attorney and his Client, for the Benefit of the Attorney, before, pending, and after, a Suit; and not only for his Benefit, but connected with the very Article and Subject in Contest in a Suit, in which he was about to be engaged. The Objection therefore is, not merely that, which flows out of the Relation of Attorney and Client, but beyond that, if not cured by a distinct, separate, detached, Transaction, after all the Circumstances and every Objection were known and understood, upon the Fact, that this was the Purchase of a Title in Litigation, with reference to the Law of Maintenance and *Champerty*.

The Authorities, which it is necessary to cite upon this Maintenance Occasion, applicable to that Objection, I take from and *Champerty*. *Hawkins's Text*; whose References fully establish the Doctrine he delivers. As to Maintenance, he (a) states, that it has been said, no one can be guilty of it in respect of any Money, given to another, before any Suit is actually commenced; yet if it plainly appear, that it was given merely with a Design to assist him in the Prosecution or Defence of an intended Suit, which afterwards is actually brought, surely it is as great a Misdemeanor in the Nature of the Thing, and equally criminal at common

(a) 1 Hawk. P. C. 537.

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Law, as if the Money were given after the Commencement of the Suit; though perhaps it may not in Strictness come under the Notion of Maintenance.

Another Passage (*a*) is material; stating *Champerty* to be the unlawful Maintenance of a Suit in Consideration of some Bargain to have Part of the Thing in Dispute, or some Profit out of it; and by Statute (*b*) it is enacted, that no Person for to have Part of the Thing in Plea shall take upon him the Business, that is in Suit.

The Year Book, 13 Hen. 7. 17, is referred to (*c*) for this Doctrine; that, though the giving Part of the Land in Suit after the End of it to a Counsellor for his Wages is not within the Meaning of the Act, if it evidently appears, that there was no Kind of precedent Bargain relating to such Gift, it seems dangerous to meddle with any such Gift; since it cannot but carry with it a strong Presumption of *Champerty*.

Lord Northington, relieving against a Bargain of this Sort, gives the Reason in these Words, that it savors of *Champerty*, or carries a strong Presumption of it.

The Cases in Print, that have Reference to this Subject, are *Proof v. Hinds* (*d*). *Walmesley v. Booth* (*e*). *Draper's Company v. Davis* (*f*). *Oldham v. Hand* (*g*). *Newman v. Payne* (*h*). In *Hylton v. Hylton* (*i*) it is

(*a*) 1 Hawk. P. C. 545.

(*g*) 2 Ves. 259.

(*b*) Stat. 28 Edw. 3. c. 11.

(*h*) *Ante*, Vol. II. 199.

(*c*) 1 Hawk. P. C. 548.

(*i*) 2 Ves. 547. *Hatch*

(*d*) *Fer.* 1.

v. Hatch, *Ante*, Vol. IX.

(*e*) 2 Atk. 25.

292.

(*f*) 2 Atk. 295.

laid

laid down as clear Law, that no Attorney can take any Thing for his own Benefit from his Client pending the Suit, save his Demand; and I add, that, as a Guardian cannot take any Thing from his Ward pending the Guardianship, or at the Close of it, or at any Period, until his Influence has ceased to exist, the Obligation upon an Attorney to refrain from taking an extraordinary Benefit is at least as strong.

The Case of *Wells v. Middleton* (a) is an extremely strong Case of this Kind. It was admitted, that the Transaction was liable to no Objection as between Man and Man: but it was overturned upon this great Principle the Danger from the Influence of Attorneys or Counsel over Clients, while having the Care of their Property; and, whatever Mischief may arise in particular Cases, the Law, with the View of preventing public Mischief, says, they shall take no Benefit, derived under such Circumstances. It is not denied in any Case, that, if the Relation has compleatly ceased, if the Influence can cease in either be rationally supposed also to cease, a Client may be generous to his Attorney or Counsel, as to any other Person: but it must go so far.

In a Case in 1767, not in Print, *Strachan v. Brandon*, the Plaintiff, by Descent a Swede, but born in England, claimed as Heir of a Swede a large Estate: being in indigent Circumstances he applied to *Willis*, an Attorney; who agreed to undertake his Cause, if a Fund could be procured. A Subscription was proposed; and *Willis* became one of the Subscribers upon these Terms; that the Plaintiff, if he succeeded, should pay the Subscribers, and among them *Willis*, double the Sums advanced; and if he failed, the Subscribers were to lose their Money. A

(a) Cited *Ante*, Vol. IX. 294. Vol. XII. 372.

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Bond set aside as, though not strictly *Champerty*, near it.

Bond was given with a Penalty of £4000; and £100 was advanced. That Case was before Lord Northington who decreed, that the Bond could not be permitted to stand as a Security for more than the £100 actually advanced; stating in his Decree, that, this Transaction though not strictly *Champerty*, was so near it, that it could not be permitted to prevail; declaring, that it savors of *Champerty*; and is therefore dangerous to public Justice (a).

That has been since followed. If such is the Doctrine let us examine this Case. Upon the Question, whether these can be represented as Bargains, made by the Defendant with the Plaintiff for the Plaintiff's Benefit, I cannot be supposed to err in stating, that the Defendant may fairly be regarded in purchasing his Client's Title upon these, or any, Terms as not meaning to purchase for his Client's Benefit. Next, this is really *Champerty*; and it is impossible to deny, that it savors of it. Then as to the Confirmation by the Deed of December, 1791, it is impossible to declare that to be such a Confirmation, in the Sense of that Word, that the Transaction is now to be regarded as free from Objection. This is not a separate, detached, Transaction; but was called for professedly under the Force, Pressure, and Influence, of the prior Transaction; and this passed, when it is impossible to represent the Plaintiff as a free Agent; when he was labouring under all the Pressure, belonging to his Situation, independent of these Transactions; his Difficulties aggravated, as they were, by the Effect of those Transactions. This Purchase therefore could not possibly have stood in 1791.

The next Question is, whether the Defendant can hold for his own Benefit the Purchase he made from Davis:

(a) See *Stevens v. Bagwell*, Ante, Vol. XV. 138.

that

That is, whether an Attorney, employed to recover this Third Part of an Estate, can by availing himself of his Situation, and acting upon the Opportunity of bargaining for the Purchase of a Mortgage, which the Client would have had, stating, that the Purchase was for the Client himself, admitting, that upon the Doctrine of Equity it was, not for his own, but for his Client's, Benefit, turn round upon his Client; and insist upon holding the Mortgage in this Instance, not only for £630, but for £1100. It is a most difficult Point to maintain, if the Purchase of the Plaintiff's Third of this Estate cannot stand, that the Defendant may set his Foot upon that, to enable him to stretch forward to a Mortgage; and in that Shape claim a Charge of £1100, having made the Purchase for £600. The Plaintiff therefore must be entitled to redeem that Mortgage on Payment of the Sum of £630 and Interest; the same Terms, upon which *Davis* would be entitled.

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There is a Question beyond that, of rather more Difficulty; whether the Defendant, having actually purchased the Interest of *Pardoe*, such as it was, and having afterwards recovered the Third of the Estate, if he must give up the original Third, is bound also to give up a Moiety of the Third he purchased from *Pardoe*. I have had much Difficulty upon that: but my Conclusion is, that he is bound to give up that also; taking it under such Circumstances, that he must be considered a Purchaser for the Plaintiff's Benefit, if the original Transaction as to the Plaintiff's own Third cannot stand; and it is too dangerous to permit these written Declarations of Trust to be done away by the Answer of the Defendant, contradicting them, and stating, that he has betaken himself to a Situation, in which he is obliged to exhibit these, as Appearances merely to evade the Administration of Justice. The Defendant therefore, being a Trustee for the Plaintiff of

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the original Third, and the Interest in *Davis's Mortgage* is also a Trustee of a Moiety of the Third purchased from *Pardoe*.

Then, as to the Acquiescence from 1791, why should that produce another Effect? Is the Plaintiff at the Moment delivered from the Difficulties, in which he was involved in 1791? He is in exactly the same Situation & Difficulty and Embarrassment as he was at that Period.

Upon those Grounds after a very anxious Consideration of this Case my Opinion is, that the Plaintiff is entitled to Relief against this Defendant to the Extent I have stated; and it follows, that, giving the Plaintiff Relief upon these Principles, I must give it to him with his Costs of Suit,

The Decree declared, that the Agreement of the 24th of October, 1789, and the 27th of January, 1790, should be delivered up to be cancelled; that the Indentures of the 24th and 25th of March, 1790, and the 23d and 24th of December, 1791, and the Fines, levied in pursuance thereof, should stand as a Security for the Balance, if any, due upon an Account; and that the Purchases from *Pardoe* and *Davis* were to be considered as made for the Benefit of the Plaintiff. Accounts were directed of what was due for Principal and Interest upon the Sum of £1100, advanced by the Defendant, and what was paid for his Fees and Disbursements, &c.; of which a Bill was to be delivered; and of the Sums advanced by him to *Pardoe* and *Davis* for the Purchases from them.

FAWKES v. GRAY.

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July 9.

MARIAN Milligan by her Will, dated the 4th of January, 1800, among other Legacies gave to the Plaintiff *Mary Fawkes* the Sum of £1000, but under this express Condition, that in case she should succeed to the Lands and Estate of *Dalskairth* and others in the Event of the Death of *Marian Paterson* without Heirs of her Body, then the said Legacy was to be void and null; and after giving some other Legacies the Testatrix disposed of the Residue of her personal Estate; and appointed Executors.

Legacy on Condition to be void, in case the Legatee should succeed in the Event of the Death of A. without Issue of her Body; Payment decreed in the Life of A. and without Security.

The Bill was filed in 1810, after the Death of the Testatrix, but in the Life of *Marian Paterson*, who had been living; claiming the Legacy; insisting, that it was to be void only in the Event of the Plaintiff's becoming under an Intail, created in 1799, entitled to the Estates at *Dalskairth* previous to the Death of the Testatrix, or to the first lawful Term after her Decease, when she directed the said Legacy to be due and payable.

Mr. Dowdeswell, for the Plaintiff, contended, that this was an immediate Bequest, vested, subject to be devested upon a future Contingency, in the Nature of a Condition subsequent; and there was no Bequest over, except the residuary Clause; that upon the other Construction it must remain dead; no one being entitled to the Interest.

The Master of the Rolls made the Decree according to the Prayer of the Bill; directing the Stock, in

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which the Legacy had been invested by the Execut
 be transferred to the Plaintiff, and without Security,
 the Authority of *Griffiths v. Smith* (a).

(a) *Ante*, Vol. I. 97.

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July 15.

The personal Estate, being the proper and primary Fund for the Payment of Debts and Legacies, can be exempted only by express Declaration, or plain and unequivocal Manifestation of Intention; and neither a Charge, nor a Direction to sell, nor the Creation of a Term for Payment, will exempt the personal Estate.

TOWER v. LORD ROUS.

CHRISTOPHER Tower by his Will, dated the 1st of June, 1791, duly executed to pass real Estate reciting, that by Articles, previous to his Marriage, he covenanted to settle certain Hereditaments, therein mentioned, to the Use of his Wife for her Life, in case she should survive him, confirmed the said Articles subject thereto gave and devised all his Freehold Manors, Messuages, Farms, Lands, Titles, Tenuages, Rents, and Hereditaments, in the Counties of Middlesex, Essex, Hertford, Bucks, and Bedford, and in the City of London, or elsewhere, subject to such Mortgages, Incumbrances as then were, or at the Time of his Death might be, affecting the same, and to the Payment of his Debts and the Legacies thereinafter given, to the Deseased Lord Rous and Sir George Cornwall, for One Thousand Years, upon the Trusts after mentioned; and, subject thereto, he gave and devised all his said Freehold Estate together with his Copyhold Estates, except those belonging to the Manor of Hemel Hampstead and all the Patronage in the Right of placing a Master in the Grammar School at Brentwood and Five poor People in Alms Houses and the Right of Patronage to the Chapel of Brentwood and the Rectory of Southwold, &c. to his eldest Son for his Life; with Remainders in strict Settlement to his

and other Sons in Tail Male, and Remainders over; and he gave the Copyholds of *Hemel Hampstead* for such Trusts, &c. as, Regard being had to the Circumstances, Nature, and Quality, of the Estates, would best correspond to the Uses, &c. declared concerning the Freehold Estates; and he gave and devised to the same Trustees, their Executors, &c. all his Messuages, Lands, and Premises, which were of Leasehold Tenure, in Trust for the Person or Persons, who for the Time being should be entitled to the immediate Possession of the said Freehold Estates under the Limitations, therein contained, to the Intent, that the said Leasehold Estates might go with the Freehold so far as the Law would permit; and after the usual Powers of leasing, jointuring, and portioning, he directed, that none of the Tenants for Life of the said Estates should fall any Timber upon any Part of his Estates except for necessary Repairs, and not in *Weald Park* even for Repairs.

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Lord Rous.

The Will then declared, that the said Term and Estate for One Thousand Years, was so limited to the said Trustees upon the Trusts, &c. after mentioned, viz. In the first Place to raise the Sum of £1000 for his eldest Daughter, above what she was otherwise entitled to by the Will, to be paid Twelve Months after his Death, with Interest; and upon farther Trust to sell such Part or Parts of his said Freehold or Copyhold Estates, except his Estates in *Essex* and *Hertfordshire*, as they with the Consent of the Person, who for the Time being should be in Possession of his Estates under the Will, should think proper to sell, in order to pay off and discharge "all
" Mortgages and Incumbrances on any of my said Estates
" and all my Debts and Legacies and particularly what
" shall be due to my said Wife for any Arrears of the
" Annuity of £200 per Annum given to her by my said
" Uncle's Will or any Security I may have given for her

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" Use for any Arrears now due; and then and in su
" Case I give and devise the Fee-simple and Inheritan
" of the Estates, whether Freehold or Copyhold, whi
" shall be so fixed on to be sold for this Purpose, un
" the Trustees, to whom I have given the said Term; a
" I will, that they or the Survivor of them or the Ex
" cutors or Administrators of such Survivor shall so
" dispose and convey, the same accordingly."

The Will then, after a Provision for the Discharge a
Indemnity of the Trustees, declared a farther Trust; th
if the £30,000 Three per Cent. Consolidated Bank A
nuities, bequeathed to all the Testator's Children by l
late Uncle *Thomas Tower*, with the accumulated Interes
shall not be sufficient to pay to each, as well Sons
Daughters, except the eldest, who by the Limitatio
shall immediately succeed to the Possession of his Estu
under his Will, the Sum of £6000 a-piece, then that t
Trustees shall by Sale or Mortgage of all or any Part
the Freehold Estate, or by Sale of the Copyhold in t
County of *Bedford*, raise the Sums following.

The Testator farther gave and devised to his Wi
Elizabeth Tower for her Life, for her Residence only (b
not to let) the Use of his Mansion-house at *Hunsmod*
and of the Park there, or of his Mansion-house at *Gad*
bridge, and of the Land thereto belonging, which he the
used therewith, and of Twenty Acres more of Land, a
joining thereto; and willed, that she should have Twel
Months after his Death to make her Election respectin
those Houses; and that in the mean Time she should ha
the Use of his Mansion-house at *Weald*, with the Office
Gardens, &c. for herself and their Children; and that t
same should be kept, as it should be at the Time of h
Death, with respect to House-keeping out of the Rents
his Estates during those Twelve Months for the Use .

his said Wife and Children; and in case the Court of Chancery should on Application refuse to make any Allowance for the Maintenance of his younger Children out of the Money given to them by the Will of his Uncle, he directed his said Trustees out of the Rents and Profits of the Estates, comprised in the Term of One Thousand Years, to pay and allow the yearly Sums therein mentioned for that Purpose; and he willed, that, if at the Time of his Death he should be entitled to any Sum of Money as personal Estate, charged on any of his Estates, before devised, the same should be extinguished for the Benefit of the Persons, entitled thereto under the Limitations aforesaid; and he declared, that his said Trustees and also his Executors should not be answerable one for another, or for the Receipts, Acts, &c.; and that his said Trustees should retain or repay to each other out of such Monies as should come to their Hands or out of the Rents of his Estates, comprised in the said Term of One Thousand Years all their reasonable Costs, &c. attending the Trusts thereby reposed.' The Will concluded thus:

" And I do hereby give and devise unto my dear Wife " *Elizabeth Tower* £1000, to be paid her as soon as " possible after my Decease, also One Moiety of my " Plate and Linen at *Weald Hall*, and all the Furniture " at my House called *Gadebridge*, likewise the best of my " Carriages and a Pair of Coach-horses, and Two Saddle- " horses; and all the Rest and Residue of my personal " Estate of what Nature or Kind soever I give and devise " the same unto such one of my Sons as shall at the Time " of my Decease happen to be my eldest Son, and enti- " tled to the Possession of my Freehold Estates, devised " by this my Will;" and he appointed his Wife and the Trustees and the Plaintiff Executors.

By a Codicil, dated the 5th of November, 1808, the
K 4 Testator

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TOWER
r.

Lord Rous,

Testator revoked the Devises in his Will to his second Son *George*; and gave to Sir *George Cornwall* an Annuity of £200 during the Life of his said Son *George*, and in Trust for him, charged upon his Freehold Estates in the Counties of *Middlesex*, *Essex*, and *Bucks*; and, if his said Son should be living at the Time of the Death of his elder Brother, and Failure of Issue Male of his Body, then he gave to Sir *George Cornwall* an Annuity of £600 (in lieu of the Annuity of £200) during the Life of his Son *George* and in Trust for him, charged in like Manner; and he gave to his Daughters *Caroline* and *Amelia* £1000 each upon their respectively attaining the Age of Thirty-five, if then unmarried; and he gave to his Son *Henry Tower* the Sum of £892; 10s: Od.; and authorized and empowered Lord *Rous* and Sir *George Cornwall* to fell Timber or other Trees, growing on any of his Estates, (except in *Weald Park*) for or towards raising Money to pay off and discharge the Mortgages and other Incumbrances, affecting any of his Estates, and also his Debts and Legacies; and he willed, that his said Trustees should raise such Money either by the Ways and Means, directed by his Will, or by Sale of Timber or by all or any of such Ways or Means, as to them should seem meet; and (after reciting, that under an Act of Parliament an Exchange had been made, by means whereof his Mansion-house at *Huntsmoor*, and the Park and Lands thereto belonging, would on his Death belong to his Wife as Part of her Jointure) he revoked the Choice, given by his Will, of his Mansion-houses at *Huntsmoor* and *Gadebridge* for her Life; and (farther reciting, that he had given to his Wife the Use of his Mansion-house at *Weald Hall* for Twelve Months after his Death) he declared the Use thereof to be for her only and such of their Children only as she should think fit to have with her; and he directed, that the House-keeping for his Wife at *Weald Hall* and such Family as she might have there should be paid for out of

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the Rents of his real Estates for Twelve Mouths next after his Death; and he willed and directed, that the Deer in the Park at *Weald Hall* to the Number of not less than One Hundred, and all his Pictures, Paintings, Prints, and Drawings, Plate, Linen, China, Books, Goods, and Household Furniture, at or in his Dwelling-house, called *Weald Hall* (except such Plate and Linen as he had given to his Wife by his Will, or might give to her by any Codicil) should go with the Freehold and Inheritance thereot according to the Limitations, contained in his said Will and Codicil; and be considered as Heir-looms belonging to the said Dwelling-house; and he thereby empowered the Tenant for Life for the Time being to cut decayed Timber in *Weald Park* for Repairs of his Estate in *South Weald*, but not for Sale.

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By another Codicil, dated the 13th of December, 1809, the Testator gave his eldest Daughter *Elizabeth* the Sum of £1200 in lieu of the Legacy given her by his Will; to his Daughters *Caroline* and *Amelia* £1000 each in lieu of the Legacies given to them by his former Codicil: to his Sons *John* and *Charles* £1000 each: to his Son *Henry* £1000 in lieu of the Legacy to him by the former Codicil: to his Son *William* £1000: to Two Servants, if in his Service at his Death £20 each: all which Legacies he directed should be paid at the End of Twelve Months after his Death; and, if not then paid, to carry Interest at £5 per Cent. per Annum from that Time; and he directed them to be raised in like Manner as by his Will and former Codicil he had directed his Debts and Legacies to be raised.

The Testator died on the 20th of March, 1810; leaving the Plaintiff *Christopher Tower* his eldest Son, *Elizabeth*, his Widow, and *George, John, Charles, Henry, William, Elizabeth, Caroline, and Amelia*, his other Children, surviving him.

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The Bill, prayed an Execution of the Trusts of the Will; and a Declaration, that the Plaintiff is entitled to such Part of the personal Estate as is not specifically bequeathed free from the Debts, Legacies, and Funeral Expences; and that a sufficient Sum may be raised by Sale of the real Estate, or of the Timber thereon, to pay the Debts, Legacies, &c., according to the Will; to be applied in Exoneration of the personal Estate.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Plaintiff: Mr. *Richards*, and Mr. *Pepys*, for the Defendants.

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July 15.

The MASTER of the ROLLS.

The personal Estate, being the proper and primary Fund for the Payment of Debts and Legacies, can be exempted only by express Declaration, or plain and unequivocal Manifestation of Intention. The Question generally is, whether there is sufficient Evidence of that Intention. It is agreed, that neither a Charge upon the Land, nor a Direction to sell, nor the Creation of a Term for Payment, will exempt the personal Estate (*a*). There is in this Will a Charge of Debts and Legacies; and a Term created for Payment of them: but there is nothing particular in the Manner of making that Charge; or the Mode, in which the Trust of the Term is declared: nothing, denoting, that the Testator intended the Land to be the primary, still less the exclusive, Fund. Then it is contended, that the Inference might arise from the Manner of giving the personal Estate: but there is nothing except the common residuary Clause: "all the rest and Residue

(*a*) *Watson v. Brickwood*, 179, and the References. *Al-Anste*, Vol. IX. 447. *Hancock v. Abbey*, *Ante*, Vol. XI. *Hadridge v. Lord Wallscourt*, 1 *Ball & Beat.* 312.

"of my personal of what Nature or Kind soever;" Not "all my personal Estate;" not "all, which I have not hereinbefore disposed of;" or any other of those Forms, which in several Cases have been held to denote an Intention to give the personal Estate as a specific Bequest. Indeed here the residuary Legatee could not take specifically what might be left, after separating from the personal Estate the particular Articles, given to the Widow; as it is admitted, that there is a Charge of uncertain Amount, which must necessarily fall upon it: viz. the funeral and testamentary Expences; affording the Inference, that he did not intend to give his personal Estate as a specific Bequest.

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It is said, the Disposition, made in Favor of the Widow as to keeping up his Mansion-house Twelve Months for her Use, &c., could not be effected, unless the Son had the personal Estate exempt from the Debts and Legacies; as the Executors would be bound immediately to proceed to a Sale of the Furniture for the Purpose of paying them: but, if the Intention was, that the Furniture should remain in the House a Year, the Widow was herself a specific Legatee of the Furniture during that Period; and it was immaterial to her, whether at the End of that Time the Son took it as a specific Legacy or as Assets for Debts. Upon the general Scope of the Will there is nothing, leading me to suppose, the Testator meant to increase his personal Estate at the Expence of his real: on the contrary there is a Direction, that any Sums he may be entitled to as personal Estate, charged upon real, shall be extinguished for the Benefit of the Person, entitled to the real. The personal Estate is not given to any one by Name, but it is to such Son as should be the eldest at his Decease; and who in that Character he supposed would be entitled to the real Estate. The

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The Circum-
stance, that

the residuary Legatee is the first Taker of the real Estate, sometimes held a Ground for exempting the personal.

very Circumstance, that the residuary Legatee is the first Taker of the real Estate, has been sometimes held a Ground for exempting the personal Estate. However it is enough to say, there is not upon this Will sufficient Evidence of the Testator's Intention to exempt it.

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April 26. 29.
May 27.
June 13. 28.

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The Presumption of Intention to satisfy a Legacy by a Portion to a Child, from a Parent, or a Person placing himself *in loco Parentis*, not raised upon a Legacy, not described as a Portion, the Legatee, reported to be the Testator's natural Daughter, described,

not so, but as the Daughter of another Man.

Direction for Sale or Transfer of Stock without Attention to the Rise or Fall: the Party must take it, as it happens at the Time of Appropriation.

WILLIAM Mowbray by his Will, dated the 10th of April, 1806, giving his Wife the Residue of his Property after Payment of his Debts, except the Sums after mentioned, among other Legacies gave as follows: "I give and bequeath the Sum of £4000 Sterling to *Louisa Hortensia Garos* Daughter of *John Louis Garos* formerly of Berwick Street Westminster: the like Sum of £4000 to *Emily Garos* her Sister and £4000 to *Julia Garos* her other Sister; and in case of the Death of One of the Three I desire that the Legacy may be divided equally betwixt the Two surviving Sisters; and in case of the Death of Two of them I desire the whole £12,000 may be paid to the surviving Sister."

The Testator also gave to *John Louis Garos* £600; and "to *Marie Genevieve Garos* his Wife the Sum of

" £2500

“ £2500 Sterling for her own Use, and over which
 “ her Husband is not to have any Power: he having
 “ lived abroad for many Years; and she in this Coun-
 “ try; and no Correspondence having passed between
 “ them during that Time. Her own Receipt shall be a
 “ sufficient Authority to my Executors for paying her the
 “ above Legacy.”

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PYE,

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Ex parte.

The Testator died on the 8th of June, 1809. His Widow became a Lunatic: the Petitioner Pye was the Committee under the Commission; and upon her Death took out Administration to her, and Administration *de bonis non* to the Testator.

The Master's Report stated from the Examination of the Petitioner Pye, that *Louisa Hortensia, Emily, and Julia, Garos* were the Three natural Daughters of the Testator by *Marie Genevieve Garos* the Wife of *John Loris Garos*; and that since the Date of the Will *Louisa Hortensia Garos* married *Christopher Dubost*; and the Testator advanced as a Marriage Portion for her, which by the Settlement appeared to have been received by *Christopher Dubost*, the Sum of £3000; and it being contended, that the said Sum of £3000 ought to be considered as an Advancement, and in part Satisfaction of the Legacy of £4000, and the whole Legacy being claimed on the Part of *Christopher Dubost* and his Wife, (who were both represented to be residing abroad) the Master did not allow the Claim.

As to the Legacy of £2500 to *Marie Genevieve Garos* the Report stated from the same Examination, that since the Date and Execution of the Will the Testator caused an Annuity to be purchased in *France*, to which Country she had retired for her Life, and laid out in such Purchase £1500; and, it being contended by the Petitioner Pye,
 that

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that the said Sum of £1500 ought to be deducted from the Legacy of £2500, as being an Advancement, and in part Satisfaction, and the whole Legacy being claimed by the Legatee, then resident abroad, the Master had not allowed such Claim; but left it open to the Party to prosecute, when in a Situation to do so.

By a farther Report the Master found as to the *French* Annuity, that by a Letter, written by the Testator to *Christopher Dubost* in *Paris*, on the 25th of *November*, 1807, the Testator authorized him to purchase in *France* an Annuity of £100 for the Benefit of the said *Marie Genevieve Garos* for her Life, and to draw on him for £1500 on Account of such Purchase; and under that Authority *Dubost* purchased an Annuity of that Value; but that, as she was married at the Time, and also deranged, the Annuity was purchased in the Name of the Testator; and the Testator sent to *Dubost* by his Desire a Power of Attorney authorizing him to transfer to *Marie Genevieve Garos* the said Annuity, dated the 10th of *June*, 1808.

The Report farther found upon the Affidavit of *Dubost* and the Copy of the Deed, that the first Intimation he received of the Death of the Testator, who died in *June*, 1809, was in *November*, 1809; and that in Ignorance of such Death *Dubost* on the 21st of *October*, 1809, exercised the Power, vested in him, by executing to *Marie Genevieve Garos*, her late Husband being then dead, and she of sound Mind, a Deed of Gift of the said Annuity; and the Master found, that by the Law of *France*, if an Attorney be ignorant of the Death of the Party, who has given the Power of Attorney, whatever he has done, while ignorant of such Death, is valid. The Master therefore stated his Opinion, that the Annuity was no Part of the personal Estate of *William Mowbray*.

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The first Petition, prayed, that so much of the Report as certifies the *French Annuity* to be no Part of the Testator's personal Estate may be set aside; and that it may be declared, that the said Annuity is Part of his personal Estate.

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~~PE**R**,*Ex parte.*DUBOST,*Ex parte.*

The other Petition, by *Dubost* and his Wife, prayed a Transfer of £3 per Cent. *Bank Annuities* in Satisfaction of £1000 of the Legacy; and that so much of the *Bank Annuities* as will be sufficient to raise £3177:3s:6d., the Residue of the said Legacy and Interest may be sold, &c.

An Affidavit was offered by *Dubost*, that upon the Treaty of Marriage the Testator assured him, that, independent of the £3000, he had already bequeathed her £4000; and *Dubost* might depend upon his not altering it. A Letter was also produced to the Testator from *Dubost*, previous to the Marriage, stating, that he would not believe the Information he had received, that the Testator, being asked, whether he would remember the young Ladies in his Will, answered " You cannot expect that;" that he had said to Mrs. *Dubost*, that he did not see, why there should be a Difference between the Sisters; and asking, if according to the Custom in *France*, he would give besides the Portion £100 to be laid out in Jewels, &c. This Letter was found after the Testator's Death among his Papers.

Sir Arthur Piggott, Mr. Richards, Mr. Wingfield, Mr. Horne, and Mr. Wear, for different Parties, in support of the first Petition.

The *French Annuity* being purchased in the Testator's Name, and no third Person interposed as a Trustee, the Interest could not be transferred from him without certain Acts, which were not done at the Time of his Death. It was therefore competent to him during his Life to change his

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his Purpose, and to make some other Provision for this Lady, by Funds in this Country; conceiving perhaps, that she might return here. The Authority, given to purchase this Annuity, could not have been enforced against him during his Life by a Person, claiming as a Volunteer: nor can it be established against his Estate after his Death: the Act, which would have given the Benefit of it against the personal Representative, not having been compleated. Where a Question is to be decided by a foreign Law, the first Step is an Inquiry by the Master, to ascertain, what is the Law of that Country.

With regard to the other Petition, and the Objection to the Letter, offered as Evidence, the Circumstances resemble those of *Shudall v. Jekyll* (*a*) before Lord Hardwicke, *Powel v. Cleaver* (*b*), before Lord Thurlow, and *Trimner v. Bayne* (*c*), before your Lordship; and the Conclusion is, that the Evidence is admissible. Lord Hardwicke's Opinion was, that this Rule as to Satisfaction is not confined to the Case of a Parent. It is true, it does not apply to a mere Stranger, standing in no Relation, natural or civil, either as a legitimate, adopted, or natural, Child: but it applies to any Person, standing *in loco Parentis*, equally as to the Parent. The Presumption was repelled in *Shudal v. Jekyll* by the Evidence; which was held to be admissible; and proved, that the Testator had no Intention of limiting his Bounty to the Portion he had given on the Plaintiff's Marriage; declaring, that he would leave her something by his Will; but would not be put under any Obligation to do it: the Evi-

(*a*) 2 *Atk.* 516.

(*b*) 2 *Bro. C. C.* 499.

(*c*) *Ante*, Vol. VII. 508.  
*Robinson v. Whitley*, *Ante*, Vol. IX. 577. As to Satis-

faction of a Debt, generally

by a Legacy. *Wallace v.*

*Pomfret*, *Ante*, Vol. XI. 542.

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dence therefore contradicting the supposed Intention to substitute the Portion for the Legacy.

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PYE,

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**The Case of Powel v. Cleaver** certainly had strong Circumstances, admitting Argument; and Lord Thurlow, finding the Legatee a mere Stranger to the Testator, who, though undoubtedly he provided a Portion for her on Marriage, stood in no Relation to her, and could not be considered as having taken upon him the Character of Parent, determined against her Claim of a double Provision.

**Trimner v. Bayne** was the Case of a Provision for a natural Daughter; which has been considered as a solid Distinction; and your Lordship decided that Case with great Attention, and upon a full Review of the Authorities. Upon the Evidence it is impossible to deny the Intention to make a Provision at least for an adopted Child, whom the Testator had educated; and that there was an ulterior Purpose in his Mind. This is the same Species of Case as *Shudal v. Jekyll*; in which the Provision by the Will, accompanied with the declared Intention of the Testator to do something more for his Niece, justified Lord Hardwicke's Decision; and the same Principle, that governed that Case and *Trimner v. Bayne*, though with a different Effect, must be applied to this: the Case of a Person, treated by the Testator as a Child, adopted and educated by him, standing upon the Evidence of this Letter *in loco Parentis* and *Filiæ*; having from the Infancy of these Children acted as their Parent; and therefore as much within the Rule as the actual Relation of Parent and Child; and the Circumstance, that the Legacy is given over upon the Contingency from one Child to another, cannot prevent its Application. The Letter of *Dubost*, which is clearly Evidence, is decisive. It is the Letter of a Person, treating upon the Subject of his proposed Mar-

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P.Y.E,*Ex parte.*

DUBOST,

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riage with the Testator, as her Parent, and also as having made a Provision for her by his Will. The Circumstance, that this Letter, which came out of the Testator's Papers after his Death, had been kept by him, the Settlement following immediately upon it, is remarkable. The Master's Report therefore is right; and the second Petition must be dismissed.

Sir Samuel Romilly, and Mr. Bell, in support of ~~the~~ second Petition; (referring, in opposition to the other Petition, to the present Law of France; declaring, that, if ~~the~~ Mandatory is unacquainted with the Death of the Mandant, or any other Cause, which put an End to the Mandate, whatever he has done, while he was so unacquainted, is valid).

It cannot be disputed, that the Advance of a Portion by a Parent on the Marriage of his Child is a Satisfaction of a Legacy, either the Whole, or Part; and that, if the Testator, though not the natural or legitimate Father, has placed himself *in loco Parentis*, the same Consequence will follow. The Difference consists in the Application of that Principle; and the Question is, whether the Testator gave this Legacy as to his Child; which must be made out: otherwise the Presumption of Satisfaction cannot arise. In no Case has the Court proceeded on any other Supposition than that the Legacy was given to the Legatee as a Child. If a Legacy was bequeathed to a Child, with whom the Testator had then no Connection, but afterwards married the Mother, took that Child as his adopted Child, and gave it a Portion as such, the Legacy not being given in the same Character, the Portion would not be a Satisfaction: the clear Conclusion, from all the Authorities being, that they must be given in the same Character.

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In this Case the Legacy clearly is not given to the Legatee as the Child of the Testator; and no Evidence can be received to shew, that it was given to her in that Character; the Will containing an express Statement, by way of Description certainly, that she is the Child of another Man. The Objection to the Letter, as Evidence, is, that it is produced directly to contradict the Will; which declares her to be the Daughter of another. If however it can be received, the fair Inference is, that she was to have both the Legacy and the Portion. It is a Letter from the proposed Husband; suggesting to the Testator, that he ought besides the Portion to give this Lady a Legacy; and representing, that he could not believe, as it was said, that he intended the contrary. The Testator leaves the Legacy standing; keeping the Letter; which must have drawn to his Attention, that besides the Portion he had given her a Legacy. The fair Inference is, that the Letter had its Effect; inducing him to make no Alteration in the Will, but to leave the Legacy standing. How is that to be otherwise accounted for? Can it be conceived, that this Testator was acquainted with these Decisions; and hence collected, that upon this Doctrine of Satisfaction it was unnecessary for him to make the Alteration? The Case of *Grave v. Lord Salisbury* (a), the Decision certainly turning upon particular Circumstances, is material, as shewing Lord Thurlow's Reluctance to extend this Rule; of which he evidently disapproved.

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The Lord CHANCELLOR.

I recollect, that Lord Thurlow in that Case, though the Decision did not turn upon it, remarked, that, as the Law

The Law does not acknowledge the Relation

(a) 1 Bro. C. C. 425.

tion of a natural Child; who is therefore considered as a Stranger, within the Rule of Satisfaction of a Legacy *prima facie* by an Advance of Money.

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will not acknowledge the Relation of a natural Child, the Doctrine of this Court, on whatever Principle founded, is, that if a Portion is given to a Child by Will, or a Gift, so constituted as to acknowledge the legal Relation, and afterwards an Advancement is made on Marriage, that is *prima facie* an Ademption of the whole, or *pro tanto*: but if the Legacy is given to a Person, standing in the Relation of a natural Child to the Testator, and he afterwards gives that Child a Sum of Money on Marriage, the Law does not admit the Conclusion *prima facie*, that the Testator at the Time of making the Will recognized that Relation: the natural Child therefore is in so much better a Situation, that in his Case the Advancement is not *prima facie* an Ademption; as it is in the Case of a legitimate Child: the Effect of which is, that the Presumption is to be formed consistently with the Notion, that the Testator has less Affection for his legitimate Child than even for a Stranger; as Lord Thurlow used to express it. His Lordship also made another Observation, of great Weight, that ought to check any Disposition to carry this farther; that, having raised the Presumption from the Fact, you beat it down by Declarations, which from the very Nature of Mankind deserve little Credit; viz. what a Man has done, or will do, by his Will: how much shall stand; and how much shall not: Declarations generally intended to mislead: but the *prima facie* Presumption is established beyond Controversy.

The Question is certainly of great Consequence, whether this Class of Cases does, or does or not, require Evidence, that at the Time the Legacy was constituted the Legatee not standing in the Relation of Child to the Testator, was regarded by him *quasi* in that Relation; conceiving the Purpose of placing himself *in loco Parentis*; and, if it is necessary, that such a Relation must then exist, it is very difficult to conclude, that this particula

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Case falls under that Description. His Purpose, whatever was his Opinion with regard to these Children, seems to have been, that no one should consider him as standing in the Place of Father. His Expressions seem particularly selected with the View to avoid the Description of a Portion; and to denote, that, not he, but some other Person, stood in the Situation of Parent.

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In *Shudal v. Jekyll*, and the subsequent Case before Lord Thurlow, upon the same Principle holding, that by such a Declaration, that he might leave something, but would not specify what, or be bound, the Legacy could not be partly cut down; a natural Interpretation was, that taking £500 from the Legacy, and leaving £500 he did leave something more beyond what he had advanced: but Lord Hardwicke correctly said, he had no Means of collecting what was that something more; and the Will, giving £1000, was better Evidence than any Conjecture he could form. If this Letter can be considered as fair Evidence, that he did not mean to disturb the Will, and that this Fortune, as it is called in the Letter, should be an Ademption of that Fortune, the Doctrine of *Shudal v. Jekyll* must be applied to this Case. This is a very important Question; and I wish to read the Cases, particularly *Trimner v. Bayne*; upon which Occasion I gave the Subject considerable Attention.

The other Question involves, not only the Construction of the French Law, and the Point, whether that has been sufficiently investigated, but farther, whether the Power of Attorney amounts here to a Declaration of Trust? It is clear, that this Court will not assist a Volunteer: yet, if the Act is compleated, though voluntary, the Court will act upon it. It has been decided, that upon an Agreement created without Consideration: in the latter Case the Court acts; not in the former.

Distinction
between a vo-
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ment to transfer Stock this Court will not interpose — but if the Party had declared himself to be the Trustee — that Stock, it becomes the Property of the *Cestui que Trust* without more ; and the Court will act upon it.

The Lord Chancellor.

June 13.

These Petitions call for the Decision of Points of more Importance and Difficulty than I should wish to decide in this Way, if the Case was not pressed upon the Court. With regard to the *French Annuity*, the Master has stated his Opinion as to the *French Law* perhaps without sufficient Authority, or sufficient Inquiry into the Effect of it, as applicable to the precise Circumstances of this Case : but it is not necessary to pursue that ; as upon the Documents before me it does appear, that, though in one Sense this may be represented as the Testator's personal Estate, yet he has committed to Writing what seems to me a sufficient Declaration, that he held this Part of the Estate in Trust for the Annuitant.

The other Question is one of great Difficulty ; whether a Sum of Money, advanced upon the Marriage of one of these young Ladies, when a Settlement was executed, is to be taken to be a Satisfaction of a Legacy, not given upon the Face of the Will as a Portion, not given to a Person, stated upon the Will to be an adopted Child of the Testator, or described merely by Name, but given to an Individual, a Stranger, described in the Will as the Child of another Person ; who is designated as the Father of that Child. It not only does not appear, that the Testator represented himself as *in loco Parentis*, but he has designated another Individual as being the Parent ; and therefore according to Lord Thurlow's Opinion in *Grove v. Lord Salisbury* (a) the Testator has expressed himself

(a) 1 Bro. C. C. 425.

in Terms, anxiously calculated to conceal the Fact, that he was the reputed Father of that Child; if he was so.

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PYE,

Ex parte.

DUBOST,

Ex parte.

Without going through all the Cases, that were cited, and those referred to in them, having compared the Case in *Atkyns* with manuscript Notes of that Case, and looked into some other Cases, one in *Ambler* (*a*), and some earlier, I may state as the unquestionable Doctrine of the Court, that, where a Parent gives a Legacy to a Child, not stating the Purpose, with reference to which he gives it, the Court understands him as giving a Portion; and by a Sort of artificial Rule, in the Application of which legitimate Children have been very harshly treated, upon an artificial Notion, that the Father is paying a Debt of Nature, and a Sort of Feeling upon what is called a Leaning against double Portions, if the Father afterwards advances a Portion on the Marriage of that Child, though of less Amount, it is a Satisfaction of the Whole, or in Part; and in some Cases it has gone a Length, consistent with the Principle, but shewing the Fallacy of much of the Reasoning, that the Portion, though much less than the Legacy, has been held a Satisfaction in some Instances upon this Ground, that the Father, owing what is called a Debt of Nature, is the Judge of that Provision, by which he means to satisfy it; and though at the Time of making the Will he thought he could not discharge that Debt with less than £10,000, yet by a Change of his Circumstances, and of his Sentiments upon that moral Obligation, it may be satisfied by the Advance of a Portion of £5000.

Legacy by a Parent to a Child, the Purpose not stated, understood as a Portion.

Leaning against double Portions: Effect in some Cases, that a Portion has been held to satisfy a Legacy of much greater Amount.

The Court seems in the older Cases to have met with some Difficulty in determining, whether this Rule should be confined to those, who stood in the actual Relation of

(*a*) *Watson v. The Earl of Lincoln*, Amb. 325.

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PYE,

Ex parte.

DUBOST,

Ex parte.

As to the Evidence of a Person, giving a Legacy and advancing a Portion as standing *in loco Parentis, quære.*

Parent and Child; and it has accordingly been urged in Argument, but not supported by Decision, except where accounted for by Evidence of Declarations, that the Court have said, they did not mean to confine this Doctrine to Persons standing in that actual Relation; but perhaps it might apply to a Person, placing himself *in loco Parentis*, undertaking the Care of an Orphan: but what is to be the Evidence of that, whether written Evidence in the Will and Settlement, or the Conduct observed at the Marriage, or to be derived from mere Declarations, is left so much afloat, that there is considerable Difficulty in making a judicial Decision upon it. .

In *Grave v. Lord Salisbury* (a), the first Case before Lord Thurlow, Lord Salisbury had several natural Children; to whom he had given Legacies by his Will; making afterwards a Provision for them during his Life, not *eiusdem generis*; giving the Living of *Hatfield* to one; a Farm and Stock to another; upon which the Question arose. It was contended, that this was a Satisfaction; that he intended by the Legacy to make a Provision, or in other Words to discharge the Obligation, he owed to that Child; and he had the same Intention, advancing the Portion, and the Farm and Stock. Lord Thurlow felt the extreme Hardship, as it is evidently, that in the Case of Children, whose Relation, as such, the Law recognizes, the Doctrine of Presumption is, that a subsequent Advancement is a Satisfaction of a Legacy to such a Child: but, as the Law does not recognize the Relation between the putative Father and illegitimate Child, as imposing this Debt of Nature, the Father in that Case stands as a Stranger; and no such Presumption arises, in that Case, where the subsequent Advance is not proved to have been for the very Purpose of satisfying the Legacy, and therefore

Distinction  
between legitimate and natural Child, as to  
the presumed Satisfaction of a Legacy by a  
Portion in the former Case,  
not the latter;  
which is considered the Case  
of a Stranger,

(a) 1 Bro. C. C. 425.

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fore the Legatee entitled to both. Lord Thurlow directed a Reference to the Master to inquire into the Circumstances; who did not report the Relation, which the Testator had to those Children; and his Lordship, being pressed to send it back on that Account, refused to do so; observing, that the Object might have been to conceal the Circumstance of that Relation; and therefore the Court would not make the Inquiry: but without deciding, what would have been the Case, if that Relation appeared, it was enough, that it stood as the Case of a Stranger; and therefore the other Provision was not a Satisfaction.

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PYE.  
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*Ex parte.*

In the subsequent Case of *Powell v. Cleaver* (*a*), where the Provision made was described as a Portion, Lord Thurlow stated expressly, that, if the Legacy is given, not as a Portion, by a Stranger, who advances Money on the Marriage of the Legatee, denominating that Advance a Portion, that Denomination will not have the same Effect in the Case of a Stranger, as it would in the Case of Parent and Child; and Lord Thurlow asserts, that there is no Authority contradicting that.

If that is right, it comes to this; that, where a Father gives a Legacy to a Child, the Legacy, coming from a Father to his Child, must be understood as a Portion, though it is not so described in the Will; and afterwards advancing a Portion for that Child, though there may be slight Circumstances of Difference between that Advance and the Portion, and a Difference in Amount, yet the Father will be intended to have the same Purpose in each Instance; and the Advance is therefore an Aderption of the Legacy; but a Stranger, giving a Legacy, is understood as giving a Bounty, not as paying a Debt: he must therefore be proved to mean it as a Portion, or Provision,

Legacy from a Father to a Child understood as a Portion, though not so described.

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*Ex parte.*  
 DUBOST,  
*Ex parte.*

either upon the Face of the Will, or, if it may be, and it seems that it may, by Evidence, applying directly to the Gift, proposed by that Will; and recollecting, how artificial the Rules are, where, a Person has educated a Child through Life, considering himself as standing in the Relation of putative Father to that Child, having a Father acknowledged, describing that Child as the Child of a Mother named, and a Father unnamed, and also making a Provision for that Father and Mother, it would be too much upon such a Will to say, this is the Case of a Person, meaning to pay, not what the Court calls a Debt of Nature, but a Debt he meant to contract: in other Words meaning to put himself *in loco Parentis*, in the Situation of the Person, described as the lawful Father of that Child.

That brings the Question to this; whether this Advance of a Portion of £3000 is an Ademption of the Legacy, between Strangers, on the Ground, that this subsequent Advance is treated as a Portion, or Fortune; and whether, the Testator having given that Legacy of £4000, and afterwards giving to that Legatee a Portion on Marriage, the mere Circumstance of giving that as a Portion or Fortune is to be taken as Evidence, that, when the Will was made, it was meant as paying a Debt of Nature; or whether it was not to be understood as in the first Instance giving a Bounty, and in the other making an Addition to that Bounty. In this Case, as in *Shudel v. Jekyll*, more was intended to be given: but in the Case of a Stranger no Authority says, the Advance of a less Sum shall be an Ademption of the Whole. This Letter, if it is to be admitted in Evidence, shews, how little such Evidence can be trusted; as no one would have supposed, upon the Correspondence, that the Testator had such a Will in his Desk. Upon the Authority of *Powel v. Cleaver*, unless you can shew, that at the Time of making the Will  
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the Testator meant to give a Portion as Parent, or as standing *in loco Parentis*, and meant to satisfy that in the Whole or in Part by the subsequent Advance, the Court is not authorized by the artificial Rules of Equity to hold it a Satisfaction.

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PYE,

Ex parte.

DUBOST,

Ex parte.

I am not much impressed by the Objection, that he had not altered his Will. The Answer is, that the subsequent Advance operates a Revocation; and therefore actual Revocation was unnecessary: but it is too much to say upon such Circumstances as are before me, that this Advance of £3000 is an Ademption of the Legacy of £4000 and the contingent Interest; and, though I believe I am disappointing the actual Intention, and that this Lady will get more than was intended, I am bound by the Rule of the Court to say, that this is not a Satisfaction.

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June 28.

Under this Judgment the Order was pronounced, dismissing the first Petition, and directing a Transfer and Sale of the *Bank Annuities*, according to the Prayer of the other; upon which it was contended, that this should be considered as an Appropriation of the Stock to this Legacy at the Date of the Master's Report; and, the Funds having since fallen, the Legatee was entitled only to so much Stock as would at that Time have produced what remained due on account of the Legacy.

The LORD CHANCELLOR said, the broad Principle of the Court is, that no Attention whatever is paid to the Rise or Fall of the Stock; and upon that Ground it is considered equal, whether the Appropriation is on one Day or another: the Party takes the Rise or Fall, as it happens: and therefore the Petitioners are entitled to have the Sum, reported due to them; now raised.

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Conversion directed by Will of real Estate into personal, not to all Intents, but for the Purpose only of answering Legacies and Annuities: subject to that as to the real Estate a resulting Trust for the Heir; which cannot be affected by an unattested Codicil, bequeathing a lapsed Share of the Residue.

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HENRY Goodwin by his Will, duly executed t real Estate, increasing an Annuity of £250 to Wife *Amelia Goodwin* under a Deed of Separation £400, and giving after the Decease of his £8333:6s:8d. Stock, upon which the original A was secured, to the Children of his Niece *Susanna* equally at the Age of Twenty-one, in case no should attain Twenty-one, or leave Issue, directed the said £8333:6s:8d. Stock should fall into the R of his personal Estate. Then, after giving a Leg £1000 to his Wife, to be paid as soon as may be at Decease on Condition of releasing Dower, and some Dispositions, he devised several real and Leasehold in the Counties of *Monmouth* and *Glocester* to *F Catchmayd* and other Persons, in Trust to sell; and the Produce in Stock for the Purpose of answering paying, or contributing towards answering and paying several Annuities and Legacies by that his Will given bequeathed, and to, for, or upon, no other Use, or Purpose, whatsoever. He then gave a Leg: £12,000 to his Brother on Condition of releasing Freehold Estate from an Annuity, and taking it out Funded Property; and, among several Annuities, g *Edward Hooper* and his Wife and the Survivor a nuity of £50; and after the Decease of the Survivor so much of his Stock as shall have been set apart answer that Annuity to and among their Children; a case no Child should survive them, directed, that the Capital Fund, intended for the Benefit of their Children should sink into the Residue of his personal Estate he directed, that the whole of the before-mentioned

nuities shall be charged upon his Capital Stock or Fund in the £3 per Cent. Consolidated Annuities; and when and as the several Annuitants die, that so much of the Capital, as was set apart for such Annuity, except otherwise disposed of by his Will, shall immediately after the Death of such Annuitant sink into and become a Part of his residuary personal Estate; and be transferred by his Executors to the several Persons "by this my Will entitled to such my residuary personal Estate."

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The Testator then, giving a great Number of Legacies, directed, that the whole of the before-mentioned Legacies shall be payable out of his aforesaid Capital Stock or Fund of £3 per Cent. Consolidated Bank Annuities at the End of one Year after his Decease; and also in case any of the said Annuitants or Legatees shall die in his Lifetime, that the Stock or Fund, which would have been appropriated for the Payment of such Annuitants or Legatees respectively, shall sink into his residuary personal Estate; and be transferred on his Decease to the Persons, entitled to such Estate by this his Will, except otherwise hereinbefore disposed of. He then gave several charitable Legacies; and directed, that all the before-mentioned Annuities and Legacies arising out of his personal Estate and all personal Legacies, which he may give by any Codicil or Codicils to his Will, shall be preferred to the Legacies given to charitable Uses in the subsequent Part thereof; and not to be liable to any Reduction, in case his personal Estate shall prove insufficient fully to defray such Legacies to charitable Uses. He then, after several other charitable Legacies, ordered, that all the said charitable Donations be paid at the End of one Year after his Decease out of his Property in the £3 per Cent. Consolidated Bank Annuities, provided there shall remain enough in the said Fund, after receiving sufficient to defray the before-mentioned Legacies and Annuities, for that Purpose,

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Purpose, but not otherwise ; and if any Deficiency of said Stock after making such Reserve shall happen directed, that an equal Reduction shall be made from each charitable Donation or Bequest in proportion to the same given ; and all the rest, Residue and Remainder, of his Estate and Effects whatsoever and wheresoever and of what Nature or Kind soever he gave and bequeathed to his Daughter *Susanna Ann Goodwin*, his Nephews *John* and *Peter Kington*, and his said Niece *Susanna Bayly* be equally divided between and amongst them Share and Share alike.

By a Codicil, dated the 2d of February, 1808, attest by Two Witnesses, reciting, that by his Will, after disposing of his Landed and other Property, and bequeathing several Legacies and Annuities, he gave, devised and bequeathed, all the rest, Residue and Remainder, of his Estate and Effects, unto his Daughter *Susanna Ann Goodwin*, his Nephews *John* and *Peter Kington*, and his Niece *Susanna Bayly*, to be equally divided among them Share and Share alike, and that by the recent Death of *Peter Kington* his residuary Estate and Effects in case of his dying without altering his said Will would become visible amongst the Survivors of his said residuary Devise which is not his Intention, he therefore revoked such before-mentioned Devises and Bequests in his Will ; and doth hereby give, devise, and bequeath, all the rest, Residue and Remainder, of his Estate and Effects, after defraying the several Legacies and Annuities in his said Will, and this and a former Codicil, dated the 21st of December last, to his Daughter, his Nephew *John Kington*, his Niece *Susanna Bayly*, and his Grand-niece, the only Daughter of *Peter Kington*, to hold in equal Proportion Share and Share alike ; and he directed, that in case *Susanna Bayly* shall die in his Life-time, her Share of the said residuary Estate and Effects shall be distributed among

amongst such of her Children as shall survive him; and he gave Two more Annuities, to be paid by his Executors and Trustees out of the Dividends of a sufficient Sum of Capital Stock standing in his Name in the £3 per Cent. Consolidated Bank Annuities, and the Capital Stock after the Decease of the respective Annuitants to their Children.

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By another Codicil, dated the 15th of August, 1808, attested by Two Witnesses, he revoked Two Legacies of £1000 each; and directed, that the same shall sink into his residuary Estate, disposed of by his said Will; and he gave another Annuity of £20, to be paid by his Executors out of Stock standing in his Name (as in the former Codicil) and after the Decease of the Annuitant directed, that the Capital Stock, from or out of the Dividends of which the said Annuity shall have been paid, shall sink into and become a Part of his residuary Estate; and thenceforth become divisible amongst the Persons entitled to such residuary Estate by his Will.

By another Codicil, dated the 26th of March, 1809, with Two Witnesses, he gave other Legacies, and to Frances Catchmayd in addition to the other Bequests to her an Annuity of £300, to be paid to her during the Term of her natural Life; and directed his Executors to set apart or purchase in the £3 per Cent. Consolidated Bank Annuities a sufficient Sum in Stock to answer the Payments of the said Annuity during the Life of the said Frances Catchmayd; which Stock upon her Decease is to fall into the Residue of his personal Estate.

The Testator died on the 23d of June, 1809. The Bill was filed by the Executors to have the Will established and the Accounts taken. The Testator left surviving him the Defendants Susanna Ann Goodwin, his only Child, his Nephew

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Nephew and Niece *John Kington* and *Susanna Bay* his Great-niece *Urania Mary Ann Kington*, the daughter of his deceased Nephew *Peter Kington*. The question arose upon her Claim under the third Codicil Share of the residuary Fund, including the Produce of the real Estate, directed by the Will to be sold: the Defendant claiming, as Heir at Law, the Produce of the real Estate as undisposed of.

Sir *Samuel Romilly*, and Mr. *Benyon*, for the Plaintiff at Law.

The Effect of this Devise in Trust to sell is a Consideration for a particular Purpose only; and, as far as that Purpose fails, there is a resulting Trust of the Interest which has lapsed, for the Heir, according to *Ackroyd v. Ackroyd* (a) and the other Cases, referred to in *Sheepwash v. Goodrich* (b). If the residuary Clause can be considered as not applying to the Property, appropriated to the particular Purpose, for which the real Estate is directed to be sold, the other Question would not arise: the Heir being also the sole next of Kin: but, if that Clause be so limited, the Question is, whether the unattested Instrument can pass the Interest in the real Estate. The instrument cannot have any Effect upon the real Estate or its Produce, arising from a Sale, directed for a specific Purpose, and not in any other Manner, converting personal Property. The Statute of Frauds (c) can thus be applied. The Effect of an unattested Instrument upon a Fund, arising from the Conversion of real Estate directed by a Will duly executed, as extending to Debts and Legacies, was fully considered in *Haber v. Vincent* (d) and *Rose v. Cunynghame* (e). This

(a) 1 Bro. C. C. 503.

(d) *Ante*, Vol. II. :

(b) *Ante*, Vol. VIII. 481.

(e) *Ante*, Vol. XII.

(c) Stat. 29 Ch. 2. c. 3.

so far from a Conversion out and out to all Intents, has marked Expressions, clearly denoting a special, limited, Object.

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Mr. Hart, Mr. Leach, and Mr. Seton, for the Defendant *Urania Mary Ann Kington*.

The true Construction of this Will is, that at the Testator's Death his real Estate was by the Effect of his Will converted into personal for all Purposes whatsoever; not merely making it subservient to a partial, limited, Purpose; subject to which it was to remain real. The Consequence is, that in the Event, that has happened, it was competent to the Testator by an unattested Codicil to dispose of that, so existing as personal Property. Upon the whole of this Will, considered altogether, and regarding the Testator's general Scheme, his principal Object was, that at his Death his whole real Estate was to be acted upon, and dealt with, not as personal Estate in the extended Sense of that Expression, but as £3 per Cent. Bank Annuities. He shews an Anxiety to relieve his Trustees from every Charge, that might impede the general Purpose of converting his Property into £3 per Cents, excluding any Inference in favor of the Heir.

There are only Two Cases, directly applicable, *Mallabar v. Mallabar* (*a*), and *Durour v. Motteaux* (*b*): both recognized by the Lord Chancellor in *Sheddon v. Goodrich* as the Law of the Court; and much stronger in favor of a resulting Trust for the Heir, from a merely partial Purpose. The Will in *Mallabar v. Mallabar* was as nearly as possible parallel to this. The Conversion being compleat by the Effect of the Will, the Question is, whether it is not competent to the Testator to act upon the Property, so

(*a*) *For.* 79.
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(*b*) *1 Ves.* 320.
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converted, by a testamentary Instrument, not having ~~Three~~ Witnesses. It is not disputed, that, having charged ~~the~~ real Estate with Debts by a Will duly attested, he ~~may~~ exhaust the whole by Debts afterwards contracted; ~~and~~ that has been extended to Legacies, given afterwards. ~~by~~ an unattested Instrument, Legacies being once ~~well~~ charged by a Will duly executed, upon *Brudenell v. Boughton* (a), *Hannis v. Packer* (b), and Lord ~~Maze~~-field's Opinion in *Windham v. Chetwynd* (c). There is no substantial Distinction between that and the Case of Residue; though the *Lord Chancellor* in *Sheddon v. Goodrich* intimates, that no Decision has gone to ~~that~~ Extent. The Residue bequeathed is but a Legacy, ~~ori~~-ginally undefined, but becoming defined by ~~withdrawing~~ what is taken out of it; and whether the Subject of ~~the~~ Bequest is ascertained by the Amount in Figures, or ~~by~~ the Proportion it bears to the whole, as in this ~~Instanc~~ce One-fourth, can make no Difference. The Principle, stated by Lord *Alvanley* in *The Attorney-General v. Ward* (d), that, the Charge being once well made, another Legatee may be substituted by an unattested Codicil, reaches this Case. In *Sheddon v. Goodrich* the *Lord Chancellor* expresses an Opinion, that, the ~~Conversi~~-~~on~~ having taken place, an unattested Instrument would ~~pass~~ the Surplus, if the Testator considered the whole as ~~per~~-sonal Property, and intended to pass it as such ~~under~~ those Terms. This residuary Clause is expressed in Terms, legally and technically applicable to ~~per~~-sonal Property: the Testator clearly meaning to pass the ~~abs~~-olute Interest, does not use any Terms of ~~Limitatio~~n; taking Care to insert the necessary Words of ~~Limitatio~~n, when giving real or Leasehold Estate; clearly shewing, ~~that~~ he was aware of the Distinction; and meant a ~~Conversi~~-~~on~~

(a) 2 Atk. 268.

(b) Amb. 556.

(c) 1 Burr. 423.

(d) *Ante*, Vol. III. 327-

t and out. The Conclusion is, that this Legatee is well
stituted by the Codicil in the Room of her deceased
ther as to the Share, which would have lapsed.

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Sir Samuel Romilly, in Reply.

The *Lord Chancellor* in *Sheddon v. Goodrich* must
ve meant such a Conversion of real Estate, that it
ould no longer go as such, but would as personal Pro-
erty go to the next of Kin; as if the Testator had ex-
essly said, that, if he should not dispose of it, there
ould be no resulting Trust for the Heir. Here is no
re Conversion than there was in that Case; which can-
t be distinguished: a Conversion for the mere Purpose
paying Legacies and Annuities, expressly given to Per-
ns named. This Codicil therefore can have no Effect
on that, which arose from the real Estate. The Court
s declared, it will no farther extend these Cases, disre-
arding the Provisions of the Statute; and *Sheddon v.*
Goodrich is a clear, direct, Decision, that the Case of a
residue does not fall within the same Reasoning, which
s been applied to particular Legacies by Analogy to the
use of Debts. The Court is now required to extend it
a new Case, always considered perfectly distinct from
it of a pecuniary Legacy: a Distinction particularly
arked in *The Attorney-General v. Ward* (*a*). From
the Instant of *Peter Kington's* Death this was so much
al Estate, not affected by any Will the Testator had
ide; and the Consequence is clear, that no subsequent
but the Execution of a Will, with Three Witnesses,
uld deprive the Heir of the Benefit of that resulting
Trust, according to *Ackroyd v. Smithson* (*b*).

(*a*) *Ante*, Vol. III. 327.

(*b*) 1 *Bro. C. C.* 503.

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July 15.

The MASTER of the ROLLS.

The first Thing to be considered is, what would become of the Share of the Produce of the real Estate, intended for *Peter Kington*; supposing, the Codicil had not been made: then it is to be seen, how far the Codicil can affect that Share. The Direction to sell the real Estate is in this Case, as it was in *Sheddon v. Goodrich* (a), in the first Instance absolute; and without any Specification of the Purpose, for which the Sale was to be made. The Purpose however distinctly appears in the immediately subsequent Clause; which declares the Trust, upon which the Purchase-money of the real Estate was to be held. It was to be invested in £3 per Cents, for the Purpose of "answering and paying and contributing towards answering and paying the several Annuities and Legacies by this my Will given and bequeathed, and to, for, or upon, no other Use, Intent or Purpose whatsoever."

It is however said, that, though the Testator has here expressed only a particular Purpose, there are Passages in the Will, which import, that the real Estate was to be converted for all Intents and Purposes into personal. He says, after giving several Annuities, "I direct, that the whole of the before mentioned Annuities shall be charged upon my Capital Stock or Fund in the £3 per Cent. Consolidated Annuities; and when and as the several Annuitants die, that so much of the Capital as was set apart for such Annuity, except otherwise disposed of by my Will, shall immediately after the Death of such Annuitant sink into and become a Part of my residuary personal Estate; and be transferred by my Executors to the several Persons by this my Will entitled to such my residuary personal Estate." By ~~any~~ ^{other}

(a) *Ante*, Vol. VIII. 481.

Clause, after giving several Legacies, he says, "I do direct, that the whole of the before mentioned legacies shall be payable out of my aforesaid Capital Stock or Fund of £3 per Cent. Consolidated Bank Annuities, at the End of One Year after my Decease; I also in case any of the said Annuitants or Legatees shall die in my Life-time, that the Stock or Fund, which would have been appropriated for the Payment such Annuitants or Legatees respectively, shall sink into my residuary personal Estate; and be transferred by my Decease to the Persons entitled to such Estate by this my Will, save and except where the Sum is appropriated or given to such Annuitants or Legatees before their several and respective Deaths otherwise herebefore disposed of."

In order to draw any Argument from these Clauses, it must first be assumed, that, when he speaks of his Capital or Cents, he means, not the Stock, belonging to him, and which in other Parts of the Will he states to be standing in his Name, but that future Stock, to be created with the Produce of his real Estate after his Death, in the Names of his Trustees. I think, there is no colour for that: but, supposing it otherwise, it would be to this only; that he had directed his real Estate to be converted, not only for the Annuitants and pecuniary Legatees, but also for his residuary Legatees under that Will: so that at the utmost it would be a Conversion for all the Purposes of his Will. In *Ackroyd v. Smith*, and other Cases of that Class, there was no real Estate involved, as to the compleat Conversion for all the Purposes of the personal component of the Will; and, if the several Legatees had lived, they would have taken among them the whole Produce of the Estate, as personal: but the Question was, whether

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(a) 1 Bro. C. C. 503.

Conversion of
personal com-
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Purposes of the
Will, not for
the next of
Kin in case of
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there was a Conversion for the Benefit of any Person who could not claim under the Will, viz. for the next Kin; and it was held, that there was not. In the Case *Collins v. Wakeman* (a) there was an express Declaration, that the Money, arising from the Sale of the Estate, should be considered as personal Property: yet a Portion of it, which turned out to be eventually unclaimed, was held to belong to the Heir.

Considered with reference to the Will therefore the Claim of the Heir to the Share, lapsed by the Death of *Peter Kington* in the Testator's Life, could not possibly be disputed. The Authorities, to which I have referred, have decided, that the next of Kin could not take. The other residuary Legatees could have no Claim, unless they were Tenants in Common of their Proportions without Benefit of Survivorship.

The Question then is, whether the unattested Codicil, dated the 2d of February, 1808, has disposed of his Share. It is well known, that an unattested Will or Codicil could have no Operation upon the Land, or the Produce of the Land. There are indeed some Expressions in the Report of *Sheddon v. Goodrich*, which seem to imply, that a Testator may consider his real Estate as by his Will thrown into personality: so that he could act upon it, as if it was personal Property: but I cannot conceive any such Case; that a Person can enable himself to dispose of his real Estate, or its Produce, by any other Sort of Will than the Law requires to pass Land. The Question however does not arise here; as there was no Conversion, except for the Purposes of his Will; therefore *Sheddon v. Goodrich* is a direct Authority against the Operation of this Codicil in favor of the Person.

Real Estate cannot be converted into personal by Will so as to enable the Testator to make a direct Disposition of it by an unattested Codicil.

(a) *Ante*, Vol. II. 683.

WL

whom the Benefit of the lapsed Share of the Residue is
by that Codicil given.

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HOOPER

v.

GOODWIN.

An Attempt was made to raise an Argument from the Cases of *Brudenell v. Boughton* (*a*), and *The Attorney-General v. Ward* (*b*), and it was said, that, if a Legacy, charged upon Land, can be given by an unattested Codicil, why not likewise a Part of the Produce of the Land? To that I answer, that the Line has always been drawn between Legacies, charged upon the Land as an auxiliary Fund, and a Portion of the Land itself, or the Produce of the Land, when directed to be sold. The Principle of these Cases may perhaps be disputable: but the Judges, by whom they were decided, did expressly declare, that with regard to a Charge upon Land only, and by consequence to the Produce of it, a Devise cannot be made or altered but by a Will, executed according to the Statute.

Distinction between Legacies, charged on the Land as an auxiliary Fund, and a Portion of the Land, or its Produce, when directed to be sold. An unattested Paper has Effect in the former Case: not in the latter.

My Opinion therefore is, that the Codicil in this Case has no Effect whatsoever upon the lapsed Share, intended for Peter Kington: but it belongs to the Heir at Law.

(*a*) 2 Atk. 268.(*b*) Ante, Vol. III. 327.

1811,
July 31.
August 1.

LOWES v. HACKWARD.

Copyhold
conveyed on
Trust to sell :
the Money to
be deemed Part
of his personal
Estate, and in
Trust for such
Uses as he
should by Deed
or Will ap-
point ; and in
Default for his
right Heir.

A Will, exe-
cuted on the
same Day, but
not referring to
the Deed, di-
recting a Sale
of particular
Property, and
disposing of the
personal Estate
in general
Terms, held
not applicable
to the Estate,
conveyed by the
Deed ; which
went to the
Heir ; no Use
being by the
subsequent In-
strument de-
clared ; if the Estate was converted.

THOMAS Hackward, being seised of customary
Lands at *Weardale* in the County of *Durham*, by
Indentures, dated the 30th of October, 1800, conveyed to
his Nephew *Thomas Hackward* and *John Lowes*, their
Heirs and Assigns, to hold unto and to the Use of them,
their Heirs and Assigns, upon Trust to permit him,
Thomas Hackward the elder, to have and to take the
Rents, Issues, and Profits, during his Life ; and from and
immediately after his Death, as to a Part, called the *Low*
Field, in Trust for his Niece *Sarah Lowes*, to hold unto
and to the Use of her, her Heirs and Assigns for ever,
paying the ancient and customary Rent for the same ; and
as to all other his customary Premises thereby conveyed,
upon Trust to sell ; and that the Money to arise by such
respective Sale and Sales, and the clear, yearly, Rents
and Profits, which might arise from the said several Estates
and Premises, should be deemed, become, and be taken
by the said *Thomas Hackward*, the Nephew, and *John*
Lowes, their Heirs and Assigns, as Part of the personal
Estate and Effects of the said *Thomas Hackward* the
elder ; and that the same should be in Trust and to and
for such Use and Uses as the said *Thomas Hackward*
the elder should in and by any Deed or Deeds, Writing
or Writings, under his Hand and Seal, attested by Two
or more credible Witnesses, or by his last Will and
Testament in Writing, to be by him signed, sealed, and
published, and declared, in the Presence of Three or
more Witnesses, direct, limit, give; bequeath, devise or
appoint, of and concerning the same ; and in default
such Direction, Declaration, Gift, Devise or Bequest,

then that the same Premises should be in Trust for the right Heirs of the said *Thomas Hackward* the elder, **his**, her or their, Heirs or Assigns for ever.

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v.

HACKWARD.

Thomas Hackward the elder, by his Will, of the same Date, duly executed, and attested by Three Witnesses, gave certain Leaschold Estates, and £200, secured on a Turnpike, to *Hackward* the Nephew, and *Lowes*, in Trust to sell; and he gave and bequeathed all his personal Estate and Effects whatsoever, except as herein-after mentioned, to them, their Executors, Administrators, and Assigns, upon Trust as soon as convenient after his Death to call in and receive all Debts; and to place the Money out at Interest upon good real or personal Securities and to receive the Interest, &c. and pay, apply and dispose of the Interest Money in Manner following; and he gave the Interest Money of all his principal Sums, so to be received by his said Trustees, their Executors, or Administrators, and put out on real or personal Security, as aforesaid, unto his Sister *Mary Henderson*, the Plaintiff *Sarah Lowes*, and his Nephew *Thomas Hackward*, for their natural Lives, equally to be divided amongst them, Share and Share alike; with a Direction upon the respective Deaths of each to call in, and pay and apply, One-third of the Principal among the Sons and Daughters of each, Share and Share alike.

The Testator died on the 5th of November, 1803; leaving his Nephew *Thomas Hackward*, his Heir at Law, and the Plaintiff *Sarah Lowes* and the Defendant *Mary Henderson*, his only Sisters, surviving him.

The Bill prayed, that the Deed may be declared a good Conveyance of the customary Estate, upon the Trusts therein expressed; and that the beneficial Interest in the Estates, or the Money to arise by the Sale, may be declared

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~~Lowes v.~~

HACKWARD.

clared to have passed by the Bequest of the Residue o
the personal Estate, contained in the Will.

The Decree, pronounced at the *Rolls* on the 15th of December, 1808, declared, that according to the true Construction of the Will the beneficial Interest in the customary Estate, conveyed in Trust to sell, or the Money to arise by Sale thereof, did not pass by the Bequest of the Residue of the Testator's personal Estate; reserving the Consideration, whether the said customary Estates, or the Money arising by Sale thereof, are liable to the Payment of the Testator's Debts; directing an Account and Inquiry accordingly.

A Petition of Appeal was presented from so much of the Decree as declared, that the beneficial Interest did not pass by the Bequest of the Residue; insisting, that the Deed of Trust was a good and sufficient Conveyance of the customary Estates; and that the beneficial Interest in the Estates, conveyed in Trust to sell, or the Money to arise by the Sale, passed by the Bequest of the Residue of the personal Estate, contained in the Will; and that the Plaintiffs may be declared entitled accordingly.

Mr. Hart, and Mr. Cooke, for the Appellants, contended, that these Instruments, executed on the same Day and for the same Purpose, to make a Disposition of the Estate, must receive the same Construction, and be read as explaining each other; and upon the true Construction of both the Intent appeared to pass all, that in any Shape could be considered as personal Estate.

Sir Samuel Romilly, and Mr. Belt, in support of the Decree, maintained, that there was no Conversion against the Heir.

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• LOWES

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The Lord Chancellor.

I do not think, that the Authorities alluded to apply closely to this. Where a Person, having a Power to dispose of the personal Estate of another, by his Will bequeaths his personal Estate, describing it as his own, not as that of the Author of the Power, that *prima facie* is not an Execution of the Power: but this Testator states expressly by a Deed, executed on the same Day as his Will, that the Money to arise by the Sale of this Estate is to be considered as his personal Estate. The Question therefore is, whether he has disposed of this, which had so become Part of his personal Estate. If it is by the Deed converted into personal Property, and given away by the Will, the Heir is disappointed: if on the other Hand, being converted it is not disposed of by the Will, it is Money arising from the Sale of the Estate; and for want of Appointment belongs to the Heir; who has a Right to say, that it shall remain Land.

If the Testator had, as I think he meant to do, recited this Deed, and referred to it, so as to entitle me to consider it as Part of his Will, there would be no Difficulty: but, construing the Will, when I find a Subject, which is to be taken to be Part of his personal Estate, I must see what Disposition the Will makes of any Thing, that can fall under that Description of personal Estate; and this Will has no Reference whatsoever to that Deed. The first Part says nothing as to the Direction of those Sums, to arise from the Sale of the Estate, conveyed by the Deed; but is expressly confined to the Leasehold Estates, and the Turnpike Bond, directed to be sold. If therefore this Copyhold Estate is to be considered as by force of the Deed having become Part of the personal Estate, the Disposition of it as personal Property, must be found in some subsequent Clause of the Will; and if there is no such

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such Disposition, the Title to this Property must go according to the Deed. The Words of Exception, "as hereinafter mentioned," give Reason to suppose, that under the general Description of his personal Estate and Effects he did include Things not enumerated in this special Trust: but then it turns round to this; whether, if he has not subsequently expressed the Purpose, attending to what follows the Effect is not, that, though included under that general Description "personal Estate and Effects," it is to be disposed of as personal Property, given upon Trusts, which are not declared. The Deed not being recited or referred to by the Will, the Direction to place out the Money can only mean the Money arising from such Sale as is directed by that Will, the Leaschold Estates and Turnpike Security.

Taking this therefore to be Part of the Testator's personal Estate, and believing, that he meant to dispose of it, I have no Right to conjecture, that the Will does dispose of that, which in Terms is not disposed of; and the Result is, that, if it remains real Estate, it belongs to his Heir; and if it is converted into personal Estate, it is his personal Estate, given to the Uses, to which he shall appoint his personal Estate; and, no Uses being declared, it is his personal Estate, to go as is directed by the Deed as to the said Money, to arise from the Sale of this Estate: that is to go to his right Heir; who has a Right to say, he will take it as Land or Money.

LEYSON

LEYSON v. PARSONS.

ROLLS.
1811,
Aug. 1.

THE Bill, filled by the Vicar of *Cadoxton*, near *Neath*, in the County of *Glamorgan*, against an Occupier of Lands in the Parish, prayed an Account of Tithes; claiming by some ancient Endowment, Usage, Custom, Prescription, or otherwise, Tithes of Wood, Hay, Mills, Calves, Pigs, Colts, Kids, Turnips, Potatoes, Honey, Gardens, Eggs, Poultry, and all Easter Offerings, due and payable within the said Parish, &c.

The Defendant by his Answer stated the Manner of accounting and paying for Tithes from Time immemorial, either in Kind or by Composition of all the Articles stated in the Bill; and as the Payment in lieu of Tithe of all Hay, made and carried in and from any of such Lands in the Tenure of such Occupier, be the Quantity great or small, as well for Two or more Farms or Tenements, as for One, the annual Value of 1d: also for every Garden or Field, sown with Turnip Seed, and for all Turnips growing thereon, the like Sum of 1d, without Reference to the Quantities thereof respectively growing, had, or taken by such Occupier.

The Plaintiff by Amendment abandoned his Claim as to all the Articles except Hay and Turnips; and having replied to the Answer, the Defendant went into Evidence in support of the *Modus* he alledged; producing a Terrier under the Hand of a former Vicar; and proving as Exhibits at the Hearing, the Office Copies of the Bill, Answer, and Depositions in a Cause of *John v. William(a)*, upon a Bill for Tithes in the same Parish.

(a) In the Court of Exchequer, 1691.

Mr.

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 v.  
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Mr. Richards, and Mr. Lewis, for the Plaintiff: Sir Samuel Romilly, Mr. Bevan, and Mr. Heys, for the Defendant.

*The MASTER of the ROLLS.*

From the Manner in which the Bill was amended after the Answer, it is a little Difficult to know what is in Issue; and consequently what is the Point to be determined. The Plaintiff first set forth his Right as Vicar to the Tithes of a great Variety of Articles; and then states, that the Defendant had upon his Farm all the enumerated Articles; that the Tithes were subtracted; and the Bill prays an Account, and Payment, of the Value of the Tithes subtracted. By Amendment the State of his Right is narrowed by striking out Wood, Potatoe and Agistment; and then his Claim is to be entitled to Tithe of Hay, Mills, Calves, Pigs, Colts, &c.: but when he proceeds to state what titheable Matters the Defendant had, he strikes out all except Hay and Turnips. In that State of the Record I wish to know whether I have any Thing to determine but the Right to the Tithe of Hay and Turnips.

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It was admitted at the Bar, that the Plaintiff's Claim was reduced to those Two Articles.

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*The MASTER of the ROLLS.*

A Modus is alledged as to both. As to that for Hay on comparing the Manner in which it is laid, with that in *Bennet v. Read* (a), there is no Distinction between

(a) 1 Anstr. 322.

then

**them.** In each Case a Custom is alledged in the Parish for every Occupier to pay a particular Sum in lieu of all **Tithe.** The Quantity is therefore immaterial. If that **Case** is to be distinguished from *Traves v. Oxton (a)*, so is this in the same Manner: if those Cases are not to be distinguished, *Bennet v. Read* being the more recent **Case**, I ought to follow it; and upon that Authority to hold that this is a good *Modus*: but the Vicar is entitled to an Issue, if he chooses.

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**As to Turnips,** the *Modus* is bad; as that is an Article of too recent Introduction into this Country to be the Subject of immemorial Usage.

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**An Issue was afterwards directed upon the Application of the Plaintiff.**

(a) 1 *Anstr.* 308. *Gwil.* 1066.

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MORISON v. TURNOUR.

1811,  
Aug. 2. 11.

**T**HE Bill stated, that the Plaintiff, being possessed of a Leasehold House, at *Esher*, employed *George Crosby* to sell it with the Furniture and Fixtures, who to the Discovery, except (stating the Particulars) of the Statute of Frauds, with an Averment, that there was no Contract in Writing, signed, &c. unless the Note in the Bill mentioned can be so considered, and for Answer (as to the excepted Particulars) admitting the Note, &c. over-ruled, as tendering an immaterial Issue.

Whether a Note, written in the Third Person, "Mr. T. proposes," &c. (making an Offer to purchase) being accepted, amounts to a Contract in Writing signed, within the Statute of Frauds, *Quare entred*

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entered into a Treaty with the Defendant for the Sale, and the Defendant wrote and sent the following Note to Crosby:

" Mr. Turnour has again seen Esher Hill Cottage, and wishes to know, if the Owner of the Lease will take for Lease, Furniture, Fixtures, &c. and the Stock of the Garden, in short for the whole Place, as it now stands, £300, subject to Mr. Turnour's Attorney proving of the Tenure, by which it is held. The Woman, who shews the House, says, that Dr. Morison has taken away, since the Inventory was made, these Articles: a Chest of Drawers, Stair Carpet, Bed rounds ditto, and all the Window Curtains, except those in the Nursery. This, and the State of Repairs induces him to make the present Offer. He will wish immediate Possession, and to have the Fruit and Vegetables left on the Premises. 6, York Street, Portman Square, 10th October, 1810."

The Bill farther stated, that Crosby by a Letter accepted the said Terms on the Part of the Plaintiff; and agreed, that the Rent should commence from Michaelmas preceding. Crosby, on the 13th of October, by the Defendant's Direction, sent the original Lease and the Assignments to his Solicitor; who returned them with the Draft of the Agreement; requesting, that it should be returned on Monday; and stating, that Mr. Turnour had appointed to meet Mr. Crosby on Tuesday to sign the Agreement. The Draft was returned accordingly; and the Appointment assented to: but the Defendant did not attend; and afterwards declined signing the Agreement.

The Bill prayed a specific Performance.

The Defendant as to the whole of the Relief, and as to

**to the whole of the Discovery, except, whether the Plaintiff did not authorise Crosby to sell the House, and write such Letter, and receive the Answer, as in the Bill mentioned, and whether such Letter is not now, or was not lately, and when last, in the Custody or Power of the Defendant, pleaded in Bar the Statute of Frauds (a); averring, that no Contract or Agreement, or Note of such Agreement, was in Writing signed by the Defendant, or any Person thereunto by him lawfully authorized, within the Meaning of the Act, unless the Note of the 10th of October, 1810, in the Bill mentioned can be so considered; and for Answer to the rest of the Bill he believes, that the Plaintiff authorised Crosby, &c. and admits writing the Letter, and receiving the Answer.**

**Sir Samuel Romilly, and Mr. Spranger, in support of the Plea.**

To meet the Objection from the Statute of Frauds the Agreement must be in Writing, signed; and a mere Note, written in the Third Person, cannot be considered an Agreement with the requisite Signature; which means the Subscription of his Name in Testimony of his Assent. Upon one Species of Instrument, a Will of personal Estate, it has been held in the Spiritual Court, that the Name in the Beginning of the Will is a sufficient Authentication of that Instrument as the Testator's Will: but what Analogy has that? There is no Signature required by Statute; and the Case has not occurred of a Devise, without any Signature subscribed, but beginning with the written Declaration of the Devisor, that it is his Will, and Three Witnesses attesting that Act. In the Case of *Stokes v. Moore* (b) the Court of Exchequer intimate an

(a) Stat. 29 Ch. 2. c. 3. (b) 1 P. Will. 771. Mr. Cox's Note (1).

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Opinion, generally as to any Instrument, that the Name, if inserted in such a Manner as to have the Effect of giving Authenticity to the whole Instrument, in any Part as well as at the End, would be a good Execution within the Statute; putting, as an Instance, the formal Introduction to a Will: but there is no such Decision; and, if a loose Note of this Kind, in the Third Person, with no Design to authenticate by Signature what was written, can have this Effect, the whole End of the Statute is done away. This Paper, if it had been signed, can hardly be considered as a Proposal, which, if accepted, would bind the Party making it. It is rather an Inquiry, previous to Proposal; and the Offer, spoken of in the latter Part, must be taken with reference to the rest, as an Offer, that he might be disposed to make; that £300 is the utmost he will offer; and therefore inquiring previously whether that Offer would be accepted; as otherwise it would be useless to make it. Upon the Construction of the whole Note that is the clear Import; and not a binding Engagement.

Mr. Hart, and Mr. Hall, for the Plaintiff.

This Plea is liable to Objections of Form: 1st. ~~in~~ attempting to cover the whole Relief, but not the whole Discovery, though incident to the Relief. In the Case ~~in~~ *Williams v. Olive* a Demurrer to Part of the Discovery of Pedigree and Title, and to the Relief, your Lordship held, that though the Defendant might have demurred to the whole Discovery, yet having given Part, he was bound to give the rest, and to plead to the Relief; observing in Answer to the Objection, that he might subject himself to penal Consequences, that he might protect himself from that by special Demurrer. This is a Sort of argumentative Plea; putting hypothetically what ought to have appeared by positive Averment; and the partial Discovery given

given is the very Thing, that ought to have been denied by the Assertion, that no Agreement was signed. Where the Plea might cover the Whole, it is over-ruled by answering any Part: *Blacket v. Langlands* (*a*). Another Objection of Form is, that the Defendant should point out the specific Part, to the Discovery of which he objects; and not, putting it as a Plea to the whole of the Discovery, with an Exception, compel the Court to look through the whole Bill.

2d. As to the Substance of this Plea the Form, required by the Statute, is complied with, and its Object secured, by Evidence in Writing, signed by the Party; guarding against the Fraud and Perjury, to which parol Transactions are liable; and the Distinctions of this Case are merely formal. The Effect of this Note is direct Proposal, waiting only for Acceptance to constitute Agreement. That a mere Letter will bind as an Agreement, was held clearly in *Tawney v. Crowther* (*b*); and the Effect of it is not destroyed by proceeding towards a more formal Agreement. The Name, as inserted in the Beginning of this Note, gives Authenticity to every Part of it equally as the Subscription of a Letter. The Place, and Manner, of Signature, whether with the Christian Name, at length, abridged, or the mere Initial, are Circumstances of little Importance. Upon the Clause of the Statute, regulating Devises, which makes signing essential, this Question has occurred: the Devisor himself writing his Will, containing his Name, with no Signature subscribed, but sealing only, that is a good Execution: *Lemayne v. Stanley* (*c*): not upon the Ground, that seal-

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(*a*) *1 Anstr.* 14.

(*c*) *1 Ltr. I.* See *Gray*.

(*b*) *3 Bro. C. C.* 161.

sor v. Atkinson, *2 Vol.* 454.

318. Forster v. Hale, *Ante*,
Vol. III. 696.

Ellis v. Smith, *Ante*, *Vol. I.*

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ing is equivalent to signing; which occasioned a Difference of Opinion; but upon the Name appearing in the Will. The Result of all the Authorities, concluding with *Stokes v. Moore*, is, that the Signature, found in any Part of an Instrument, as the Mark or Token authenticating the whole, is sufficient.

*Sir Samuel Romilly, in Reply.*

It was very difficult to frame a Plea to this Bill. The Question upon the Record is, whether the Paper, which the Defendant admits he has written, is binding within the Statute; meaning to insist, that the Signature required is in the first Person, with both Names; and he has done no such Act. This Defence cannot be made by Plea, if not in this Form. This resembles those Cases, where the Plaintiff, anticipating the Defence, endeavours to get rid of it, setting up Circumstances in Answer; as upon the Plea of a stated Account (*a*), a Release, or Award: in such Cases the Plea is not over-ruled by the Answer; which is essential to support the Plea, and this is a Plea of the same Nature as those. The Bill, stating the particular Writing alledged to amount to a Contract, does not proceed to assert, that there was no other written Agreement, which would have let in a Demurrer.

A Man, thus describing himself in the Third Person, has never been decided to have signed within the Act of Parliament; which requires a Signature as attesting what he has written. It is not necessary to sign it as an Agreement; but he must sign. In the Instance of the Will the Name, though in the Beginning, authenticated the whole Instrument as that, by which the Testator meant to abide as his Will; which is very different from a Nam-

(a) *Mif. 208.*

occurred

occurring in the Third Person. *Lemayne v. Stanley* (*a*), to the second Point, that sealing is equivalent to signing, has certainly been over-ruled; and the Case has never yet occurred of a Testator calling in Witnesses to see him begin, instead of conclude, his Will: nor is so singular a Mode of Execution likely to occur. The Court will attend to the great Mischief of departing rather from the Provisions of this Statute, and of encouraging Suits for specific Performance upon loose Memorandums, and Subjects of small Value.

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MORISON
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The Lord CHANCELLOR.

It is extremely clear, that, if this Letter and the Answer to it do not amount to an Agreement, taking this ~~case~~ out of the Statute, the subsequent Transactions have that Effect. The Question therefore is, whether this Letter, which cannot be represented otherwise than as an Answer, is to be taken as an Agreement or Memorandum Writing, signed by the Defendant within the Statute; having been accepted by the Answer, that was sent. The Defendant, putting his Defence upon the Record in this Way, pleading the Statute to the whole Relief, and to whole Discovery, with the Exceptions stated, and averring, that no Contract or Agreement, &c. was in writing, signed by the Defendant, unless this Note can be considered, does not in this Part admit or deny, that the Letter is his Hand-writing; but proceeds to state, in his Way of Answer, his Belief, that the Plaintiff did authorise Crosby to deal; and admits, that he did send the Letter, and receive the Answer.

August 5.

To this Plea Two Objections are taken: one of Form

(a) 1 Lev. 1.

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Plea, supported by Answer, which must also contain a Denial generally by Averment.

the other of Substance; and as to the former, I thin is vicious in Form. If a Bill for specific Perform states the Agreement generally, with no Representa fixing it as in Writing, or not, as that general Aver may be understood of an Agreement either in Writing not, though a Plea of the Statute, with an Averment, there was no Agreement in Writing, has rather the pearance of an Answer, I have understood, that it been always admitted in that Form (*a*): but, if the states an Agreement in Writing, and seeks nothing but Execution of that Agreement, a Plea, that there is Agreement in Writing, is no more than so much o Answer. This Bill seeks the Execution of the Ag ment, contained in the Letter set forth and the Ans it; and the Plea is, that there is no Agreement in Wri unless that Letter is an Agreement in Writing.. In n Instances (*b*) a Plea, supported by an Answer, must i contain something of Denial in a general Way of wh stated by the Bill, and afterwards denied by the Ans Here the Defendant proceeds to aver, that there is Agreement in Writing, unless this Note is such ; nei admitting, nor denying, that it is his Writing. The C sequence is, that, if the Plea is found to be true, the C has a Record in this State : the Defendant alleging by Plea, that there is no Agreement in Writing, unless Note is such Agreement: the Plea therefore stating cisel what the Bill states. The Court cannot upon gument of the Plea put an End to the Cause; as, i is allowed, still Judgment will be necessary upon Question, whether that Letter and the Answer t amount to an Agreement in Writing.

As to the Substance of this Plea, I fully agree, that

(*a*) See *Bayley v. Adams*, *Ante*, Vol. VI. 586.      (*b*) *Bayley v. Adams*, A Vol. VI. 586.

Court has gone much farther than a wholesome Attention to this Statute with reference to the specific Performance of Agreements will justify ; but upon this particular Point has not gone farther than Courts of Law : what is the Construction of the Statute, what within the legal Intent of it will amount to a Signing, being the same Question in Equity as at Law. Upon that Point, this Court professing to follow the Law, if a new Question arises, I would rather send a Case to a Court of Law.

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The Parties having expressed a Wish to have the Lord Chancellor's Judgment upon the Question, his Lordship offered to give his Opinion, if they chose to have it : but on this Day the Defendant's Counsel declined it ; having just received Information, that the Estate had been put up to Sale ; which they considered an Abandonment.

August 6.

*The Lord CHANCELLOR.*

Though I am ready to give my Opinion, I by no Means press it upon the Parties ; considering this as a Case, that has never been determined as to Land. I observe, Lord Hardwicke in *Grayson v. Atkinson* (a), commenting upon *Lemayne v. Stanley*, intimates a very clear Opinion, that if the Testator with his own Pen says "I, A. B. do make this my Will," &c. and acknowledges that before the Witnesses, that is a good Execution ; and that the Case in *Levins* cannot be sustained, unless you add One of Two Circumstances ; either that the Witnesses were present, when he was writing the Will ; which, Lord Hardwicke justly observes, is not a natural Presumption ; or, if they were not present, that he acknowledged it to be his Writing, when he called them in to attest it ; certainly within the Statute of Frauds.

(a) 2 Ves. 454.

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## CASES IN CHANCERY.

1811.      tainly expressing his Opinion, that such Acknowledgment would do.

~~MORISON~~

v.

TURNOUR.

The Plea was therefore over-ruled upon the formal Objection.

1811,  
August 2.

## THOMAS v. OAKLEY.

The Jurisdiction against Waste by Injunction and Account applied to Trespass, by exceeding a limited Right to enter and take Stone from a Quarry:

being a Destruction of the Inheritance; as in the Case of Timber, Coal, &c.; and the Distinction between Waste and Trespass therefore disregarded.

THE Case, stated by this Bill, was, that the Plaintiff was seised in Fee-simple of an Estate, in which there was a Stone Quarry; and the Defendant, having a contiguous Estate, with a Right to enter the Plaintiff's Quarry, and take Stone for building and other Purposes, confined to a Part of his Estate called Newton Farm, had taken Stone to a considerable Amount for the Purpose of using it upon the other Parts of his Estate; praying an Injunction and Account.

To this Bill the Defendant demurred.

Mr. Hart, and Mr. Horne, in support of the Demurrer, relied on the Distinction between Waste and Trespass; this being a mere Trespass; and the Account too trifling to change the Jurisdiction.

Mr. Benyon, for the Plaintiff.

The Course of modern Authority is to afford Assistance in these Cases, of Coal-mines, Timber, &c. to prevent irremediable Mischief: an Injury, which Damages could not

not compensate. In *Mitchell v. Dors* (a) and many other Cases, your Lordship, following Lord Thurlow, gave Relief; giving the Injunction, where an Action of Trespass might be maintained; and the Account follows the Injunction; to prevent Multiplicity of Suits.

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v.  
OAKLEY.

### *The Lord CHANCELLOR.*

The Case has this Specialty: the Bill admits the Defendant's Right of Entry into this Quarry, and of taking Stones for all the Purposes of *Newton Farm*; though, if he takes for any other Purpose, undoubtedly an Action would lie: but is there any Distinction between this Case and that of a Coal-mine? Is not this taking away the very Substance of the Estate just as much as in the Case of a Coal-mine? After the Decisions, that have taken place, this Demurrer cannot be maintained. The Plaintiff represents himself to be seised as Tenant in Fee of an Estate, in which there is a Stone-quarry, that is Parcel of the Estate. He then states, which upon this Occasion I must take to be true, that the Defendant, having an Estate in his Neighbourhood, consisting of *Newton Farm*, among other Lands, as Owner of that Farm has a Right to enter into the Quarry for the Purpose of taking Stone, as far as he has Occasion for building and other Purposes upon that Farm: but the Plaintiff represents, that the Defendant has taken Stone, for the Purpose of Application, not upon *Newton Farm* only, but also upon his other Estates, and to a very considerable Amount. That is Trespass beyond all Doubt, and not Waste; as there is no such Privity between the Parties as would make it Waste. His Entry for the Purpose of taking Stone with reference to *Newton Farm* is lawful: but, if under Color of that Right he takes Stone for the Enjoyment, not of his Farm only, but his other Estates, his Entry to that

(a) *Ante*, Vol. VI. 147.

Extent

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Thomas  
v.

Oakley.

Formerly, before Injunction was applied to the Case of Trespass, upon the Death of the Party an Account was given: the Trespass dying with the Person.

Extent is unlawful, and his Act a Trespass; and, if it is settled, that the Court will interfere by way of Injunction and Account, this Demurrer cannot prevail.

The Distinction, long ago established, was, that, if a Person, still living, committed a Trespass by cutting Timber, or taking, Lead-Ore, or Coal, this Court would not interfere; but gave the Discovery; and then an Action might be brought for the Value discovered: but, the Trespass dying with the Person, if he died, the Court said, this being Property, there must be an Account of the Value; though the Law gave no Remedy. In that Instance therefore the Account was given, where an Injunction was not wanted. Throughout Lord Hardwicke's Time, and down to that of Lord Thurlow, the Distinction between Waste and Trespass was acknowledged: and I have frequently alluded to the Case, upon which Lord Thurlow first hesitated: a Person, having a Close demised to him, began to get Coal there; but continued to work under the contiguous Close, belonging to another Person; and it was held, that the former, as Waste, would be restrained: but as to the Close, which was not demised to him, it was a mere Trespass; and the Court did not interfere: but I take it, that Lord Thurlow changed his Opinion upon that; holding, that, if the Defendant was taking the Substance of the Inheritance, the Liberty of bringing an Action was not all the Relief, to which in Equity he was entitled. The Interference of the Court is to prevent your removing that, which is his Estate. Upon that Principle Lord Thurlow granted the Injunction as to both. That has since been repeatedly followed (a); and whether it was Trespass under the Color of another's Right actually existing, or not.

(a) See *Mitchell v. Dors*, *Ante*, Vol. VI. 147.

If

If this Protection would be granted in the Case of Timber, Coals, or Lead-Ore, why is it not equally to be applied to a Quarry? The comparative Value cannot be considered. The present established Course is to sustain a Bill for the Purpose of Injunction, connecting it with the Account in both Cases; and not to put the Plaintiff to come here for an Injunction, and to go to Law for Damages.

1811.

~~THOMAS~~

v.

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The Demurrer was over-ruled.

**HALLETT v. BOUSFIELD,**

1811,

Aug. 8.

THE Ship *Ocean*, lately returned to this Country from *Buenos Ayres*, having met with tempestuous Weather, it became necessary for the Safety of the Ship to lighten her by throwing Part of the Cargo overboard; and accordingly a Quantity of Bark, the Property of the Plaintiff, was with other Goods, belonging to other Persons, thrown overboard.

The Plaintiff moved for an Injunction to restrain the Master and Ship-Owner from delivering any Part of the Cargo, and receiving the Freight, or parting with any Share of the Ship; insisting on a Lien for Contribution.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Wilson*, for the Plaintiff, relied on the general Law, as laid down and parting with any Share of the Ship. The Mode of Adjustment not confined by Usage to Arbitration.

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## CASES IN CHANCERY.

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 HALET  
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by Mr. Abbott (*a*), as supporting the Right to Contribution; referring to *Shepherd v. Wright* (*b*); in which Case the Decision was against the Plaintiff on the Ground, that the Destruction of his Property was not strictly for the Benefit of those, who were called on for Contribution.

**Mr. Leach, and Mr. Agar, for the Defendant.**

This Plaintiff is not the only Sufferer: the Property of many other Persons also being destroyed; who are equally entitled to Contribution. A general Account is therefore necessary. The Course at *Lloyd's* in these Cases is to refer it to Merchants, to ascertain, what is to be paid to each Freighter; and for that Purpose the usual Bond has been prepared; and signed by all the Freighters, except the Plaintiff. The general Right to Contribution, and to pray it in a Court of Equity, is not disputed: but upon what Authority can the Plaintiff lock up all this Property, until the Account is taken: an Inconvenience of such Extent, that, if authorised by the Law, it ought not to remain unredressed by the Legislature. The Plaintiff must establish a Lien for every Freighter upon the Ship and the rest of the Cargo: but how can the Doctrine of Lien, the Right of a Party, having Property in his Possession, to retain it, until his Demand is satisfied, be applied to the Interest of a Freighter; who has no Possession; the whole being in Possession of the Owner? Mr. Abbott says, it is usual for those, who seek Contribution, to file a Bill, or bring an Action; but cites no Authority for this Lien; which is altogether novel and unfounded; and may produce great Inconvenience from the perishable Nature of the Cargo, and the possible Event of a Bankruptcy, while the Defendant is prevented from receiving the Freight due.

(*a*) Abb. Ship. 354.

(*b*) Show. Parl. Cas. 18.

Sir

*Sir Samuel Romilly, in Reply.*

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The Plaintiff desires no more than that at the present Moment, when nothing is settled respecting Contribution by the different Freighters and the Owner, the Court will not permit those, who have the Property, liable to Contribution, by parting with it to remove his only Security. Certainly there is no Authority establishing this Lien upon the Remainder of the Cargo: but is it contended, that the Master is justified in delivering the Cargo to all the different Consignees without taking any Security for Contribution? The Proposition must go to that Extent: but the general Commercial Law binds him, before Delivery of the Goods to the Consignees, or Holders of Bills of Lading, to take Security from them for Contribution to a Loss, thus occasioned by a partial Sacrifice for the general Safety; providing for the Adjustment at a future Time of that equal Contribution, which natural Justice demands, but which cannot be made at the Time. The Text of this Law (a) has been universally adopted. Mr. Abbott (b) states, that by the Civil Law the Master was required to take Care to have the Contribution settled, and to receive the Sums to be contributed, and pay them over to the Losers; and might sue or be sued for them; or might retain the Goods for the Sums to be contributed by their Proprietors. As to the Mode of Adjustment, he does not speak of Arbitration; but says, that in case of Dispute the Contribution may be recovered either by a Suit in Equity, or an Action at Law, instituted by each Individual, entitled to receive, against each Party, who ought to pay, for the Amount of his Share; and in the Case of a

(a) *Lege Rhodiā cavetur, ciatur quod pro omnibus datum est.* Dig. 14. 2. 1.  
 ut si levandae Navis Gratia  
 Jactus Mercium factus sit, (b). Abbott, Ship. 373.  
 omnia Contributions sar-

general

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general Ship, where there are many Consignees, it is usual for the Master, before he delivers the Goods to take a Bond from the different Merchants for Payment of their Portions of the Average, when the same shall be adjusted.

These Passages strongly support the Lien upon the Commercial Law, requiring the Master not to part with the Cargo, until he has taken Security for the Loss, when adjusted: whether by Arbitration or a Suit in Equity is left uncertain; and this results necessarily from the Manner, in which Property of this Kind is disposed of; passing by Bill of Lading; parcelled out in different Shares, and Bills given upon their Credit to various Persons, whom it may be very difficult to find, when the Goods are gone. One Mode suggested, by Action, would be very inconvenient: but that this is a proper Subject for a Suit in Equity is not disputed; though the Injunction is resisted.

53.

*The Lord CHANCELLOR.*

This is a Question of great Importance, as connected with the Convenience or Inconvenience, which may be the Consequence. It is impossible for me to say here, that Parties are obliged to refer such Claims to Arbitration: neither will any Principle justify the Administration of Law and Equity according to the Usage of *Lloyd's Coffee-house*. It seems to me also, as well as I recollect the Text-Law upon this Subject, that in such Case there is a Lien upon the Goods of each Freighter for Contribution and Average in some Sense: that is, the Master is not bound to part with any of the Cargo, until he has Security from each for his Proportion of the Loss: but there is no Authority, that on the Ground, that he has a Lien to the Extent of entitling him to call on every Person to give Security for the Amount of their Average when it shall be adjusted, every Owner of a Part of the Cargo can compel the

## CASES IN CHANCERY.

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le Captain to do so ; and it strikes me, upon the short  
ime I have had to consider it, that is a Length the Plaintiff  
annot reach. The Defendant, it is true, is a Trustee for  
thers : but the Nature of the Trust is regulated by the  
Practice ; and there is no Instance of an Action or a Suit  
i Equity to effectuate this Lien otherwise than through  
e Right of the Master to take Security : that Practice  
certaining the true Nature and Extent of the Lien. In  
he Case of *Shepherd v. Wright* (a), though the Bill was  
ismissed, the Court certainly meant to maintain the Juris-  
diction by personal Process to compel the other Owners  
o make Contribution. As there is no Trace of Authority  
upon it except that Case, I canot without farther Consi-  
leration represent myself as Master of the Subject : but  
he strong Iuclination of my Opinion is, that this Lien  
annot be carried farther than I have stated. The Bond,  
hat has been prepared, is only for such Average as shall  
e established by Arbitration. They have no Right to  
ay, it shall be tried in no other Way : but there is no  
Doubt, that the Obligee in the Bond would be a Surety  
or the Plaintiff ; and that would bring it back to the  
Question, whether he is entitled to have the Bond to him-  
self, or to the Captain for him.

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1811.

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HALLETT

v.  
BOUSFIELD.

No Order was made.

(a) Show. Parl. Cas. 18.

BROWN

**CASES IN CHANCERY.****BROWN v. HIGGS.**

THE Decree in this Cause (*a*) was affirmed in the ~~House~~  
of Lords, in 1813.

(*a*) *Ante*, Vol. IV. 708. Vol. V. 495. Vol. VIII. 561,

**END OF THE FIRST PART.**

# CASES IN CHANCERY, &c.

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1813, 51 Geo. 3.



KENNET, *Ex parte.*

1813,  
Jan. 26.

HIS Petition prayed, that the *Lord Chancellor* would disallow a Bankrupt's Certificate on the Ground, that he fell within the Provisions of the Act (*a*), which renders the Certificate void in Cases of Gaming.

The Affidavits on each Side were in direct Opposition.

Mr. Cullen, in support of the Petition.

Sir Samuel Romilly, for the Bankrupt, resisted the Petition on the Ground, that the Affidavits in support of it, were not sufficient to stay the Certificate; which, if allowed, would not prevent the Party petitioning from trying the

Petition to disallow a Bankrupt's Certificate, as void by Gaming: the Affidavits being in direct Opposition, the Certificate was allowed; with the View of giving an Opportunity to try the Fact at Law.

(*a*) Stat. 5 Geo. 2. c. 30. s. 12.

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Fact

## CASES IN CHANCERY.

1813.

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KENNET,
Ex parte.

Fact of Gaming in an Action at Law: the Certificate
being void, if there had been such Gaming, as the Act of
Parliament prohibited.

The Lord CHANCELLOR.

The Ground of this Application is, that I should not grant a Certificate, which, if granted, will be void. In this Respect it differs from an Application to stay a Certificate, which, if granted, is admitted to be good. The Law has certainly said, that where a Man loses £5 in Gaming in the Course of a Day, his Certificate shall be void.

I perfectly agree, that this Court ought not to grant the Certificate, if it be clear, that the Law has in that Respect been violated: but then it ought to be clear; as, refusing a Bankrupt his Certificate, I refuse him the Trial of the Fact by a Jury. Amidst the contradictory Affidavits, that have been read, I cannot say, what the Fact is. I will, therefore, grant the Certificate; and it will then be for the Petitioner to avoid it at Law; or to indict ~~for~~ Perjury.

Costs were refused.

SAY

SAY v. BARWICK.

ROLLS.

1812,

July.

Dec. 18.

Lease set aside
with Costs ; as
obtained by the
contrived and
habitual In-
toxication of
the Lessor, im-
mediately on
coming of Age,
at a very in-
adequate Rent;
and Acts of
Confirmation
held not suf-
ficient.

THE Object of this Suit was to set aside a Lease, granted by the Plaintiff to the Defendant.

The Bill stated, that the Defendant, with the Design of procuring this Lease from the Plaintiff at an inadequate Rent, prevailed upon him to go to the Defendant's House, and to different Public Houses in the Neighbourhood, almost daily for a considerable Time before the Plaintiff attained the Age of Twenty-one; on which Occasions the Plaintiff was by the Persuasion of the Defendant induced to drink to Excess: that the Defendant, having during this Period obtained the Promise of a Lease, gave Instructions to an Attorney to prepare it; that the Day before the Plaintiff came of Age the Defendant kept him concealed from his Friends; prevailing on him to drink to Intoxication; in which State he returned Home at a late Hour; that, having been called up at an early Hour on the next Morning the 7th of July, 1809, the Day, on which he came of Age, he executed the Lease about Seven o'Clock; not being then recovered from Intoxication; that the Lease was at a grossly inadequate Rent: the Lands being let at a Rent of Twelve Shillings an Acre, though worth Twenty or Thirty Shillings.

The Answer represented, that, the Defendant being turned out of his Farm, the Plaintiff's Father, with whom he lived on Terms of Intimacy, had promised to let him have a Farm: that the Plaintiff in October, 1808, repeated that Promise: and about a Month after executing the Lease pointed out a Mistake in spelling his

1812.

~~SAY~~
v.

BARWICK.

Name; proposing to the Defendant, that it should be rectified by the Attorney; and had the Counterpart corrected accordingly. The Answer denied the Charge of Inadequacy; that the Intoxication was occasioned by the Defendant's Contrivance; that he had instructed the Attorney to prepare the Lease; that the Plaintiff was intoxicated, when he executed the Lease, &c.

The Plaintiff's Evidence stated his almost incessant Intoxication in the Company of the Defendant for more than Twelve Months previous to the Execution of the Lease; that the Plaintiff spent little of his Time at Home; being chiefly at the Defendant's House; generally returning Home in a State of Intoxication; that he declared, he was in bad Hands; and could not get out of the Difficulty: that he was very much intoxicated on the Evening, preceding the Day of his coming of Age: and continued so on the Morning of that Day. The Depositions stated the Value of the Farm to be from £86 to £100 a Year: the Rent reserved by the Lease being only £51.

The Defendant's Evidence stated the Promises of the Plaintiff and his Father to provide the Defendant with a Farm; that the Plaintiff gave Instructions to the Attorney to prepare the Lease; that at Six o'Clock of the Morning, on which the Defendant came of Age, he called up One of the Witnesses; and sent him to the Attorney, who prepared the Lease; desiring, that he would come directly; that the Lease was executed between Six and Seven o'Clock on that Morning; that it was read over before Execution; that the Plaintiff, though addicted to drinking, was perfectly sober at that Time; that after the Execution he declared himself satisfied; and Six Weeks after granting the Lease consulted the Attorney, whether the Mistake in spelling the Name, which, he said, he had observed in looking over the Lease by himself, would

would make it void; as he was determined, that the Defendant should have a Lease; and that the Plaintiff personally delivered Possession of Part of the Property to the Defendant on the 11th of October, 1809.

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v.

BARWICK.

Sir Samuel Romilly, and Mr. Horne, for the Plaintiff.

The Consideration for granting this Lease is grossly inadequate: the Rent reserved being barely Half the Value: but, attending to the Circumstances, under which the Lease was executed, that is not surprising. For many Months antecedent to the Plaintiff's coming of Age he was kept in a State of Intoxication, if not, continual, certainly habitual, and produced by the Defendant's Contrivance. The Case amounts to this: habitual Intoxication of an Infant, in the Company of the Defendant, taking Advantage of the Influence, thus gained, to obtain a Lease at Half its Value. Considerable Suspicion would be thrown upon the Transaction, if in other Respects apparently fair, by advertizing to the Time, when it took place: between Six and Seven in the Morning of the very Day, on which the Plaintiff came of Age; almost the first Moment, when the Law allowed him to execute a binding Instrument. There is not in the Evidence a single Instance of Intoxication not in the Defendant's Company. In all the Cases, where Instruments have been set aside as obtained in a State of Intoxication, it has been esteemed very material to ascertain, how that Intoxication was produced (*a*). It is true, here is no Evidence, who paid for the Liquor, drank by the Parties: but at the Defendant's House, where the Plaintiff was frequently intoxicated, the Expence must have been defrayed by the Defendant; and the Plaintiff, as an Infant, not being liable for the Liquor, drank at the Public House, the Defendant must be presumed to have been at that Ex-

(*a*) *Cooke v. Clayworth*, 18 Ves. 12.

CASES IN CHANCERY.

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v.

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pence also. The Plaintiff is proved to have been actually intoxicated, or so stupified from previous Inebriation, as to be perfectly inadequate to judge upon the Propriety of what he did, at the very Moment he signed the Lease, which this Suit seeks to set aside; and that Intoxication was produced by the Management and Contrivance of the Defendant. *Johnson v. Medlicott (a)*, *Griffin v. Deveuille (b)*, are clear Authorities for the Relief.

*Mr. Hart, and Mr. Dowdeswell, for the Defendant.*

Though the Plaintiff at the Period of his coming of Age, and previously, lived at his Mother's House, he was liberated from all Control. He sought the Society of the Defendant, and those of a similar Rank in Life. The Plaintiff's Friends were not ignorant, that he proposed to do an Act of Service to the Defendant. The original Transaction under all the Circumstances in Evidence is not a Case for Relief: but, admitting that, it is now precluded by the subsequent strong Acts of Confirmation: especially by correcting the Error in the Lease, and personally delivering Possession. The Case cannot turn on Inadequacy of Consideration; as the Plaintiff might have given away the Property; instead of leasing it; had he been so disposed.

*Sir Samuel Romilly, in Reply.*

This is a Case of Intoxication, produced in the Minor, which had not ceased in the Adult. The Instructions for the Lease, given under both Disabilities, designed Intoxication and Infancy, ought at least to have been re-

(a) Note (a) to *Osmond v. Fitzroy*, 3 P. Wms. v. *Fitzroy*, 3 P. Wms. 130. 131.

(b) In Mr. Cox's Note to

peated,

peated, when he was of full Age, and sober. The Evidence establishes, that the Plaintiff had been practised upon: nor will the supposed Acts of Confirmation, tainted with the Vice of the original Transaction, avail the Defendant.

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SAY  
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*The MASTER of the ROLLS.*

The Object of this Bill is to set aside a Lease, which upon the Morning of the Day, on which the Plaintiff came of Age, he executed to the Defendant. The Allegation of the Plaintiff is, that some Time before he came of Age he had been almost daily induced by the Defendant to drink to excess: sometimes at Public Houses: sometimes at the Defendant's own House; and that Advantage was taken of his Youth and Inexperience, and the Habit of Intoxication, into which he had been seduced, to prevail on him to grant this Lease at an inadequate Rent, and under unusual and disadvantageous Covenants. The Defendant's Representation is, that the Plaintiff's Father had promised the Defendant a Lease; which Promise was renewed by the Plaintiff; and that the Rent was not inadequate; but as good as could have been obtained from any other Tenant.

Dec. 18.

There is a great deal of Evidence on both Sides as to the Plaintiff's Habits of Life for a considerable Time, before he came of Age; and as to the Degree, in which the Defendant had been instrumental in producing and encouraging those Habits. The Plaintiff upon the whole appears to have passed much of his Time in drinking in Company with the Defendant; who, if he did not entice, was always ready to accompany, the Plaintiff to Public Houses: as well as to receive him and supply him with Liquor at his own House; and that the Plaintiff most com-

## CASES IN CHANCERY.

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monly went Home in a State of Intoxication after having been in Company with the Defendant. It appears, that they passed together the greatest Part of the Day, preceding the Execution of the Lease; that the Plaintiff returned Home intoxicated at Night; but directed, that he should be called at Five the next Morning; that he did get up at an early Hour; and went to the Defendant's; where the Lease, which had been previously prepared, was executed about Seven in the Morning. Different Representations are given as to his State at the Time of the Execution. Some Witnesses say, he was so much affected by the former Night's Debauch as to be utterly incapable of Business: others represent him as perfectly cool and collected; and aware of what he was about. My Impression is, that he did know what he was doing; and that what he did was merely an Execution of what he had previously promised and determined to do: through what Inducements he had formed his Resolution is a different Consideration. There are several Witnesses to repeated Declarations of his Intention to give the Defendant a Lease of this Farm; but there is only One, (the Defendant's House-keeper,) who makes the Plaintiff ascribe that Intention to a Compliance with the supposed Wish of his Father. She makes him say, that his Father had charged him to be kind to the Defendant; and that he would let him have the *Swan* Farm. But, whatever might have been the Inducement in the Mind of this Infant, (for such he was) to promise in general Terms a Lease to the Defendant, the Question remains, what Sort of Lease he was ever intended to have. The Plaintiff's Father is stated to have felt Concern, that the Defendant should lose the Farm he had before occupied, and be obliged to remove from the Neighbourhood. The Inference is, that he intended only to give him the Benefit of another Lease; such as any other Tenant would have; and the Answer insists, that this Lease is at as high a Rent as any other Tenant

Tenant would give; precluding the Supposition, that it was ever intended, and agreed, that the Defendant should have a Lease at a great Undervalue.

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Now this Farm is proved to be let at not much more than Half its Value. The Rent reserved is £51. By the lowest Estimate it is worth £86, and some of the Witnesses say, it is fairly worth £100. The Covenants are not so advantageous to the Landlord as is usual in the Part of the Country, where the Farm lies: and no Evidence whatever of the Adequacy of the Rent is given by the Defendant. The Plaintiff therefore in granting a Lease on such Terms must either have acted in total Ignorance of the Value of his Estate, or he must have been imposed upon with regard to it. This must to all substantial Purposes be considered as the Lease of a mere Infant. The Seal certainly was put to it a few Hours after he was of Age: but the Agreement was made, the Terms were settled, the Instructions given, the Engrossment prepared, during his Infancy. He had not for a single Hour the Opportunity of applying his adult Judgment to the Subject.



Stripping this Case of all other Circumstances, can a Lease, thus disadvantageous, and obtained in such a Manner, be permitted to stand; unless it has since, with full Knowledge of all the Circumstances, been deliberately confirmed? With regard to that there is Evidence, that the Plaintiff subsequently declared himself satisfied with what he had done; that about Five Weeks afterwards he pointed out to the Attorney, who drew the Lease, a trifling Mistake in it; and said, that, if necessary, he was ready to execute it over again; and farther, that on the 11th of October, which was about Three Months afterwards, he put the Defendant in Possession of the Farm. These are the confirmatory Circumstances insisted on: but it is not at all shewn,

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v.

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shewn, that at either Period the Plaintiff was apprised of the true Value of his Estate; and consequently of the Degree, in which the Lease was injurious to him; and at the latter Period he was living at the House of the Defendant, and in the same Habits, as at the Time of making the Lease. Very soon after he quitted the Defendant's House the present Bill was filed. Under these Circumstances I think there is nothing amounting to Confirmation. Consequently the Lease must be set aside; and the Defendant must pay the Costs of the Suit.

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1812,

Nov.

Dec.

## HOWARD v. BRAITHWAITE.

Specific Performance of a Contract concerning Land not decreed on the Signature of an Agent without Authority.

The Question as to his Authority, denied by the Answer, and by his Deposition, stating his Declaration to the contrary at the Time of Execution, to be

BY Indenture, dated the 9th of November, 1803, Timothy Stonehouse Vigor and George Vansittart, Lessees under the Dean and Collegiate Church of Westminster, granted an Under-lease to the Plaintiffs of an Estate at Westbourn Green in the County of Middlesex for the Term of Twenty-one Years commencing the 29<sup>th</sup> of September, 1804; if certain Lives, or any other Person, for whose Life Vigor and Vansittart should hold the Premises should so long live, at the Rent of £80 per Annum.

In the beginning of 1804 the Defendant entered into a Negotiation with the Plaintiffs; proposing to take from them an Under-lease of a Part of the Estate, consisting of One Hundred and Thirty Acres; and at his Instance, being desirous of procuring a greater Term, the Plaintiffs

determined by an Issue: the Evidence of a Witness, impeaching the Instrument he has attested, as a Witness to a Will, denying the Sanity of the Devisor, &c. being admissible; but to be received with the most anxious Jealousy.

applied

applied to *Vigor* and *Vansittart*; who consented to sell the whole of their Interest to the Plaintiffs for £12,300, £300 to be paid at the Execution of the Conveyances, the Remainder to continue on Mortgage. The Negotiation proceeding between the Plaintiffs and the Defendant, on the 31st of October, 1804, a Meeting took place at the House of the Plaintiff's Solicitor; the Defendant being attended by his Solicitor; when it was agreed, that the former should prepare, and send to the latter, the Draft of an Agreement: but, the Defendant afterwards objecting to contract with the Plaintiffs, until it was ascertained, whether they could agree with *Vigor* and *Vansittart* for the Purchase of their Interest, it was on the 29th of November, 1804, agreed, that the Defendant should be substituted for the Plaintiffs in the Contract, which they had proposed to enter into with *Vigor* and *Vansittart*; and the 19th of December, 1804, being fixed for the Execution of that Contract, a Meeting took place by Appointment on that Day, previously, at the House of the Plaintiff's Solicitor; which was attended by the Plaintiff *Charles Edward Howard*, and by the Solicitor of the Defendant; who was not present at that Meeting. An Agreement was drawn up by the Solicitors, entitled "Heads of an Agreement, made this 19th Day of December, 1804, between *John Braithwaite* and *Barnard Edward Howard* and *Edward Charles Howard*;" by which, reciting, that the Defendant was in Treaty with *Vigor* and *Vansittart* for the Purchase of their Interest, the Defendant agreed in Consideration of the Plaintiffs surrendering up to him, after he should have completed his Purchase from *Vigor* and *Vansittart*, the whole of the Premises with the Exception of certain Parts amounting to Thirteen Acres, to grant a Lease of the excepted Premises to the Plaintiff *Edward Charles Howard* for Seventy-eight Years, commencing after the said Term of Twenty-one Years, at a Pepper-corn Rent; renewing such

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such Lease from time to time for Ninety-nine Years, whenever a Renewal should be made with the Dean and Chapter by the Defendant; and in case the Defendant should make a Purchase from the Dean and Chapter, he undertook to execute a Conveyance to the Plaintiff *Edward Charles Howard* and his Heirs.

This Agreement was signed by the Solicitor for the Defendant; and afterwards on the same Day the Defendant signed an Agreement with *Vigor* and *Vansittart* for the Purchase of their Interest at £12,200, to which the Defendant's Solicitor was a subscribing Witness. The Conveyance and Assignment necessary to carry this Agreement into Effect were afterwards executed.

The Bill prayed, that the Agreement of the 19th of December, 1804, signed by the Agent of the Defendant might be specifically performed; or, in case it should appear, that the Agent was not properly authorized to sign that Contract on behalf of the Defendant, then that it may be declared, that the Conveyance of the Estate and Interest of *Vigor* and *Vansittart* to the Defendant was obtained by Fraud and Misrepresentation and that he may be declared a Trustee for the Plaintiffs and be decreed to assign to them the Estate and Interest so acquired by him.

The Defendant by his Answer admitted the Execution of the Agreement by his Solicitor, stated to be his legal Agent merely: and that the Arrangement of the Term of the Agreement was confided to *Ashton*, his Surveyor alone; but positively denied, that the Solicitor was the authorized Agent of the Defendant to execute such Agreement; and stated, that after the Execution of the Agreement with *Vigor* and *Vansittart*, when the Defendant was first informed of the Agreement, executed by his Solicitor, which was in many Respects contrary to the

Instruction

Instructions, given by the Defendant, he immediately declared, that he would not confirm it; as being signed without his Knowledge or Consent, and contrary to the Terms, prescribed by him.

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The Solicitor in his Depositions stated himself to be the mere legal Agent of the Defendant; that *Ashton* was solely relied upon by the Defendant to arrange the Terms of the Agreement: that the Deponent was never authorized by the Defendant or by any other Person on his behalf to sign or execute on his Part the Agreement of the 19th of *December*; or any Paper-writing whatever: that the Deponent did consent to sign such Agreement at the express Desire and Persuasion of the Plaintiff *Edward Charles Howard* and his Solicitor, upon their positive Declaration and Assurance, that *Ashton* had perused the Agreement as it then stood; and had approved of it on the Part of the Defendant; with the Truth of which Assertion the Witness was impressed: that previously, and at the Time he so signed the Agreement, he informed the Plaintiff *Edward Charles Howard* and his Solicitor, that he, the Deponent, had no Directions or Authority whatever to sign the same on the Part of the Defendant; and that, having made such Declaration, he did not conceive, that his Signature was binding upon his Client; and the more so as the Plaintiff *Edward Charles Howard* not only signed his own Name to the other Part of the Agreement, but also signed the Name of the other Plaintiff *Barnard Charles Howard*, without producing, or, as the Witness believes, having, any Authority so to do: that prior to his signing the Agreement the Plaintiff *Edward Charles Howard* and his Solicitor expressed great Anxiety, that the Deponent should sign it; by way as they alleged of settling the Business One Way or the other; and, to induce him to sign, the Solicitor in the Presence of the Plaintiff *Edward Charles Howard*

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*Howard* stated to the Deponent, that he need no  
any Objection; as the Agreement had been perus  
*Ashton.*

Sir *Samuel Romilly*, and Mr. *Bell*, for the Plaintiff contended, that the Defendant's Solicitor by signing the Agreement held out to the World, that he had Authority comparing it to the Case of Witnesses to a Will, by Signature giving Authority to believe, that the Testator was sane, &c.; and, though they may be admitted afterwards to contradict that, Courts of Justice very rightly receive such Evidence; and would not recommend a Jury to find a Verdict upon it; that the Defendant's Solicitor was to be considered as a general Agent for the Cases of Agents with limited Authority had no application: the Decree therefore ought to be pronounced as upon a legal Agreement by a Person properly authorized within the Statute of Frauds.

Mr. *Richards*, Mr. *Hart*, and Mr. *Wingfield*, for the Defendant.

### *The Lord CHANCELLOR.*

This Case involves several very considerable Points of great Importance; to which for that Reason I shall turn my Attention the last; as, if upon the whole Case, in Allegation, Proof and Admission, I can regard this as One Transaction, in which the Parties were deavouring to acquire what I shall call, inaccurately, an Inheritance, with the View, that One should have the Property, and the other a Lease; if the Terms are clearly to be collected; so that I can consider the whole including Two Agreements, as One Bargain, no written Agreement between these Parties was necessary; then I must collect from the Record the Terms of Contract.

**Contracts.** If the Case is not to be viewed in that Light, the next Consideration is, whether the Inheritance has not been obtained by the Defendant under such Circumstances, attending to the whole Transaction, in dealing with each other, and as this Acquisition of the Inheritance actually took Effect, that I can infer an Obligation by the Defendant upon good Faith to hold the Benefit he has acquired, not for himself, but in Trust for others; unless he will agree to some reasonable Lease, which they will accept; and I am not satisfied, that sufficient Authority has been laid before me for saying now, that there are not great Difficulties in deciding those Questions affirmatively.

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Upon the third Question, while there is any Hope of Arrangement, it is only necessary to say, that it will not be decided without sending it to another Tribunal.

The Statute of Frauds (*a*) says, that no Man shall be bound by an Agreement concerning Land, unless the the Statute of Agreement is to be found in some Writing, signed by himself, "the Party to be charged therewith;" or by some Agent, "thereunto," that is, as I understand it, to the signing thereof, lawfully authorized by such Party. Therefore, laying out of Consideration the Cases of Part-performance, an Agreement for the Purchase of an Estate is not binding, unless signed by the Party, to be charged, or by some Person, lawfully authorized by him thereunto: that is, to the signing.

Provisions of  
Frauds as to  
the Execution  
of Contracts  
concerning  
Land and  
Devises.

This Statute has also, with reference to Persons, who are to attest Wills, said (*b*), that no Devise of Land shall be good, unless it is attested by Three or Four Witnesses; and the same Clause states, that the Signature

(*a*) Stat. 29 Ch. 2. c. 3.      (*b*) Section 5.

1. 4.

of

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of the Party himself is not necessary: but the Will must be signed by him, or by some other Person in his Presence, and by his Direction. With respect to a Class of Cases, referred to on the Part of the Plaintiff, I think that judicial Opinions against giving Credit to Persons who, having attested Wills, are afterwards called to impeach the Execution, has been carried rather too far. Lord *Mansfield* often said, he would hear the Witnesses; but would give no Credit to them. Lord *Kenyon* followed him in that. I have differed from both those great Judges; and have acted upon my Opinion to this Extent; that, if the Witnesses are to be heard, their Credit is to be duly examined: but their Testimony is to be received with all the Jealousy, necessarily for the Safety of Mankind attaching to a Man, who upon his Oath asserts that to be false, which he has by his sole Act attested as true. Every Circumstance therefore is to be regarded with a strong Inclination to believe, that what he did was right; and that he swears under a Mistake: but if it is established, that the Testator was not sane, that the Agent was not authorized, the Law has not empowered any Judge to refuse to give Effect to that.

In this View the Case is of extreme Importance: but in a Bill for the specific Performance of an Agreement you must charge the Agreement to have been signed, if not by the Party, by an Agent, lawfully authorized; and how can a Decree be obtained without Admission, or Proof, that he was lawfully authorized? The Doctrine would be new, and is not stated here, that the mere Production of an Instrument, purporting to be signed by a Man, not having a general Authority, but acting *in hoc Casu* upon a special Authority, is to be taken as Proof of general Authority; though that is positively denied by the Defendant's Answer, and by the Deposition of the Person

**Person**, represented as having such Authority. That is  
**not** Doctrine, upon which a Court of Equity can proceed.

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If the Question, whether the Defendant's Solicitor **was** an Agent, duly authorized according to the Statute to the signing of this Agreement, was sent to Law, I have no Doubt, a Judge would tell the Jury, they must look at his Evidence with the most anxious Jealousy; that the Safety of Mankind requires it; and, giving him Credit for the Belief, that he thought himself correct in making this Deposition, he cannot, I conceive, now think it quite accurate; and a Judge cannot possibly so describe it.

If therefore it rested merely upon the Evidence of this Agent, his Deposition must be examined, distinguishing his Declaration, that he had no Authority to sign: the Fact, independent of that Declaration, must be examined with the Jealousy, that I have stated much lower than the Judges I have mentioned; and with due Attention to all the Circumstances, the Probabilities of what must have passed on that Day, and the Circumstances, belonging to the Fact, that the Defendant, who was to have been present, was absent, all the prior Circumstances, and the subsequent Circumstance, that for Ten Days no Representation was made to the Plaintiffs, that this Agent had no Authority; which was the more incumbent, if Ashton's Conception of the Imposition, practised upon Howard, was infused into the Mind of that Agent; and was not acted upon for Ten Days.

Whether a Man is a general, or a special, Agent, and, Distinction admitting the Difference of the Principle, governing the between a general and special Agent as Question, how much farther one can bind the Principal than the other can, it is impossible, supposing a special Agent can bind beyond his Authority, to contend, that if

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Auctioneer may limit his general Power of Agency: but only by Declaration, equivalent in legal Effect to the general Authority. Upon that Principle Evidence of loose Declarations at the Sale not admitted.

he made at the Time a Declaration, that he had no Authority, the Principal can be bound. So in the Case of a general Agent, as an Auctioneer, he may at the Auction state, what Limitations are imposed on his general Power of Agency: but that Declaration must be of such a Nature, that the Law will affect the Person, to be affected by it, as he would be affected under the general Authority. Upon this Principle loose Declarations at a Sale by Auction are not permitted to be proved by parol Evidence.

I do not deny, that the Supposition, that the Agent made this Declaration, renders the whole more improbable, than otherwise it would be: yet I am not satisfied, that he made no such Declaration; and, if it is established, that he had not the Authority, though he honestly believed he had it, the Ground for decreeing a specific Performance fails.

When I state my Opinion, that an Issue is necessary, my Impression is, that under all the Circumstances of such a Case as this, the Credit both of the Defendant and the Witness will be much better appreciated by a Jury, duly informed by a Judge as to the Principles of Law, than they can be by me upon any Attention I can give to the Proofs in the Cause; and I think more Issues than One will be necessary; as, if the Jury should find, that this Person was not authorized to sign this Agreement, I am not sure, that the Defendant, if the Signature did not bind him, may not be bound by his Conduct: the Circumstances of his Absence, unaccounted for, and no Objection made by him for Ten Days, having regard to the Nature of the Transaction, and the Benefit, acquired by him in the mean Time by Negotiation, which, if not connecting itself with, embraced both Bargains,

gains, may be usefully put to the Jury; whatever  
would be their Verdict upon the first Issue.

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therefore the Parties do not come to some Arrangement, which is very desirable, I shall endeavour to decide the Two first Questions: if either of those should be in the Plaintiff's Favor, it will not be necessary to determine the third; which cannot be decided with so much Propriety as before a Court, who can more accurately to the Facts and the Credit of the Parties, than I can.

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Dec. 22.

**BRYANT, *Ex parte.***

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Feb. 1.

HIS Petition was presented by a Bankrupt; praying, that the Commission may be superseded. No Appeal from the Lord Chancellor in Bankruptcy.

Bankrupt, disputing the Commission, having failed in One Action, not restrained, as upon vexatious Conduct, from bringing another; but not directed without a new and special Ground: the Costs of the Assignees out of the Estate.

Trading, in the Instance of an Attorney buying and selling Books, whether sufficient to support a Commission; depending upon whether the Nature of the Dealing, however small, is such as to manifest an Intention to deal generally.

Omission of the Affidavit of Debt upon taking out a Commission of Bankruptcy to state a Judgment obtained for the Debt, originally by Specialty or simple Contract, forms no Objection to the Commission.

Commission of Bankruptcy supported upon a Debt, for which a Judgment was obtained pending the Two Months Imprisonment for Debt, constituting the Act of Bankruptcy. Distinction as to a Bond taken; which would be void by relation to the Commencement of the Period.

Ground for superseding a Commission of Bankruptcy, that a Part of the Bankrupt's Property will satisfy all the Debts; taking care to secure that Object immediately and effectually.

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The Bankrupt disputing the Commission upon all its Grounds, the petitioning Creditor's Debt, the Trading, and the Act of Bankruptcy, the *Lord Chancellor* directed an Action to be brought; and the Commission was established by the Verdict; and an Application for a new Trial was refused.

The Bankrupt, being still dissatisfied, in Person presented the *Lord Chancellor* for a farther Investigation by directing another Trial, or in some other Way; and that the Examination may in the mean Time be stayed; insisting, that there was not sufficient Proof of Trading; which was represented to be by buying and selling Books: the Bankrupt being an Attorney and Solicitor; that the Affidavit of the petitioning Creditor on suing out the Commission stated his Debt as upon simple Contract, though he afterwards proved upon a Judgment; that the Judgment having been obtained after the Commencement of the Imprisonment for Debt, which constituted the Act of Bankruptcy, the Debt was by relation subsequent to the ~~Act~~ of Bankruptcy; that the Creditor, by proceeding at Law had made his Election; and could not sue out a Commission; and that the Bankrupt was solvent; and was willing and able by the Sale of a particular Estate to pay his Debts.

Mr. Richards, and Mr. Montague, for the Assignees, represented the Bankrupt's Conduct as vexatious and oppressive; that there was no Foundation for any of the Objections; which were properly disposed of by the Result of the Action; that the Bankrupt's Title to the Estate alluded to was disputed; and that under these Circumstances he should be restrained from farther Resistance to the Commission; which had been issued Two Years; and that the Examination should proceed.

The

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BRYANT,  
*Ex parte*

*The Lord Chancellor.*

Upon the different Objections, on which this Petition ought to supersede the Commission, I directed an Action be brought. First, with regard to the Trading, it is obvious, that the Question, whether the Nature of the Dealing, however small, is such as to manifest an Intention to deal generally in the Article, is a Question of so much Delicacy, that it is peculiarly fit for the Consideration of a Jury. Difficulties were raised also upon the petitioning Creditor's Debt; and upon the Act of Bankruptcy, lying Two Months in Prison, as connected together; and, the Bankrupt having failed in that Action, I opted the constant, uniform, Course, as I could not re Costs against the Bankrupt, to allow those Persons, so succeeded in sustaining the Commission for the Benefit all the Creditors, to take their Costs out of the state.

It is contended upon the Objection to the petitioning creditor's Debt, that a Judgment, obtained after an Act of Bankruptcy, is to be considered in quite a different view from a Bond, so taken; as to which it has been long settled, that a Bond, taken after an Act of Bankruptcy for a pre-existing Debt by simple Contract, would not merge that Debt (*a*); for this Reason; that by the Act of bankruptcy the Bond is a Nullity: the Person, who gives it is incapable of executing such an Instrument; and the consequence is, that the Debt by simple Contract remains unaffected. It is urged however, and with Weight, that this is not so, where the Creditor proceeds to a Judgment, particularly a Judgment *in invitum*. The Bond is taken from a Man, not known to be a Bankrupt: but a Judgment is obtained from a Man in Prison, with the

(*a*) See 1 Cooke Bank. Law, 19. (Ed. 1804.)

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Object of getting a better Security, and founding an Act of Bankruptcy upon that Imprisonment. All these Questions were the proper Subject for an Action at Law; which were either disposed of, or, if not brought before the Court, that is not the Fault of those, who sustain the Commission.

The Objection, taken to the Affidavit of the petitioning Creditor's Debt on suing out the Commission, is, that stating the Consideration, as supporting the Allegation of Debt, the Affidavit imports, that it is a Debt by simple Contract. The Bankrupt contends, that it is not so, but a Debt by Judgment; and it is insisted, that the Act of Parliament (*a*), directing, that the Creditor shall make Affidavit of "the Truth and Reality" of his Debt, requires, that he shall describe the specific Nature of the Debt, such as it is: it is farther said, that, when this Creditor proved his Debt under the Commission, he referred to the Judgment; and it is insisted, not only that he must state his Debt in his Affidavit, as I have represented, but coming to prove under the Commission he must prove a Debt of the same Nature, as well as the same Amount, as that contained in his Affidavit. That is not the true Construction of the Act of Parliament, and is inconsistent with the Practice, which has prevailed many Years. Proof upon a Judgment will not stand merely upon that, if there is not a Debt due in "*Truth and Reality;*" for which the Consideration must be looked to. The Creditor's Omission to mention the Judgment would not prevent the Commission; as the Court is to be satisfied by the Affidavit, that there is a true and real Debt; and it has never been required, that the Affidavit should state the Debt with the Precision of a special Pleading, bringing an Action upon it; having regard to all the Se-

(a) Stat. 5 Geo. 2. c. 30. s. 23.

critics

~~C~~urries at the Moment. That was never considered necessary; and there is hardly an Instance, in which it has been done. This Objection therefore fails.

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BRYANT,
Ex parte.

The next Objection taken is upon the late Act of Parliament (*a*), declaring, that it shall not be lawful for any Creditor, who has, or shall have, brought any Action, or instituted any Suit, against any Bankrupt, in respect of any Demand, which arose prior to the Bankruptcy, or which might have been proved as a Debt under the Commission, to prove a Debt under such Commission for any Purpose whatever, or to have a Claim entered, without relinquishing such Action or Suit; and that the proving or claiming a Debt shall be deemed an Election to take the Benefit of such Commission: but that cannot apply to the petitioning Creditor; who was always held to have made his Election (*b*). Neither of these Objections therefore can be maintained.

I have been pressed by the Petitioner to put this in some Course for farther Investigation by way of Appeal. I have no Way of doing that: the Legislature having thought it right to make this Jurisdiction final; and I cannot say, that it is my Duty, if I could, to put in a Course of farther Investigation a Case, upon which I have so strong an Opinion, as I have upon these Objections. The Questions upon the Trading, the Act of Bankruptcy, and the petitioning Creditor's Debt, are concluded by the Event of the Trial, that has taken place; unless upon this Consideration, the Court will not permit a Bankrupt to try repeatedly and vexatiously the Question of Bankruptcy:

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| (<i>a</i>) Stat. 49 Geo. 3. c. 321. s. 14. | <i>Ib.</i> 153. <i>Ex parte Lewes,</i>
<i>Ib.</i> 153. <i>Ex parte Crinsoz.</i> |
| (<i>b</i>) <i>Ex parte Wilson,</i> Atk. 152. <i>Ex parte Ward,</i> | 1 Bro. C. C. 270. |

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 BRYANT,  
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but, if he has failed in a single Action, the Court will not prevent his bringing another: neither will the Court direct another Action; but will take no Part. If the Petitioner chooses to try the Bankruptcy again in an Action, an Application must be made, when it is fit to make it, to prevent his trying that Question vexatiously: but a single Trial does not constitute that Vexation, that will authorize the Court to interfere by Injunction. All, that I can do at present, is to dismiss this Petition.

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*Mr. Richards, for the Assignees, applied for the Costs out of the Estate.*

*The Lord CHANCELLOR.*

They must have the Costs. Whoever are concerned in effectually supporting a Commission of Bankruptcy are always considered as Persons struggling, not for their own Interest, but for the general Benefit of the Creditors; and the constant Course is to pay the Expence out of the Fund, belonging to them all.

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The Bankrupt, having brought another Action, renewed his Application, that the Proceedings may be stayed, and his Offer of the Estate as a Security for the Payment of his Debts.

*The Lord CHANCELLOR.*

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There is no Doubt, that an Offer by the Produce of the Sale of an Estate to secure the Amount of all the Debts, proved under a Commission of Bankruptcy, has frequently received much Attention from the Court: the Object of the Commission being to satisfy the Creditors,

if

**if it appears, that they can be satisfied by other Means, the Court would not permit a Proceeding to go on, attended with an Expence, which under such Circumstances would be entirely thrown away: but I recollect no Instance, that upon a mere Offer to secure a Debt, without other Circumstances, the Court has stayed Proceedings; unless perfectly satisfied, that the Offer would be made good.**

**Considering this Case independent of that Offer, I agree, that it is unnecessary to cite Precedents to shew, that Proceedings will be stayed, where the Validity of the Commission is about to be tried; and this Case is an Instance of that. I did so in another late Case (a) upon this Ground; that**

**(a) In *Ex parte Collins*, heard in Lincoln's Inn Hall, 14th January, 1812, the Petition by a Bankrupt, prayed, that the Commission should be superseded upon Objections to the Act of Bankruptcy, and the Trading, one of the Questions raised being, whether a Scavenger, a Person giving to a Parish a considerable Sum of Money for the Liberty of carrying away the Mud, &c. collected within the Parish, and the Dust from the Houses, was a Trader within the Bankrupt Laws? There was also an alledged Dealing in Pigs and Bricks. An Issue was accordingly directed, the Proceedings being stayed in the mean Time.**

Sir Samuel Romilly, Mr. Hart, and Mr. Montague, for the Petitioner.—Sir Arthur Piggott, Mr. Leach, and Mr. Cullen, for the petitioning Creditor.

**The Lord CHANCELLOR postponed the Examination; observing, that it did not appear on the Proceedings, that the Commissioners could have had before them, what was the Nature of the Dealing: it was sworn to be by buying and selling Ashes and Breeze: but *quo modo* did not appear upon the Depositions. There is great Difficulty in holding a Scavenger, contracting with a Parish in this Way, to be a Trader within the Act of Parliament; though he certainly**

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Whether a Scavenger, contracting with a Parish for valuable Consideration for Liberty to take the Mud, Dust, &c. is a Trader within the Bankrupt Laws. *Quare.*

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that the Commissioners had adjudged the Party a Bankrupt without sufficient Authority : but upon the Allegation, that sufficient Proof would be furnished, I put them to an Issue ; staying the Proceedings then before me without sufficient Proof to support them. Upon a Principle not unlike that I stayed the Proceedings in this Case : the Bankrupt insisting, first, that there was no petitioning Creditor's Debt ; secondly, that there was no Trading ; thirdly, that there was no such Act of Bankruptcy as connected with the petitioning Creditor's Debt, if there was one, would support the Commission.

The Question as to the Trading, depending upon the Fact, with what Intent he bought and sold Books and Prints, was in its Nature fit for the Consideration of a Jury. Upon the Act of Bankruptcy it was contended, that the Fact of lying in Prison for Debt Two Months was not under the Circumstances an Act of Bankruptcy ; and farther, that, if it was an Act of Bankruptcy by relation to the Commencement of the Imprisonment, the Creditor, having altered the Nature of his Debt, originally by simple Contract, or Specialty, taking a Judgment between the Time of the first Imprisonment and the Commission issued, was not at the latter Period such a Creditor as at the former ; and therefore could not support the Commission ; which by relation stands upon an Act of Bankruptcy, previous in Date to the Judgment.

That was a Question of Law ; and, attending particularly to the Trading, I directed an Action ; staying certainly may be a Trader in the Articles of Pigs and Bricks.

An Issue was directed as to the Trading and the Act of Bankruptcy : his Lord-

ship adding, that he was rather disposed to direct a Issue than an Action, where it appeared, that the Cause insisted on was not laid before the Commissioners.

Proceedings.

**Proceedings.** The Petitioner having had an Opportunity of trying the Validity of the Commission in an Action, I cannot, consistently with the Safety of Mankind, listen to a Suggestion, that as much Skill and Diligence were not applied in the Trial of that Action, as ought to have been applied. That would be attended with too much Danger to the general Interest of the Public. Upon the Trial of that Action the Opinion of the Jury under the Direction of the Judge was, that there were a good petitioning Creditor's Debt, Trading and Act of Bankruptcy; all the Essentials to making a Man liable to the Bankrupt Laws; as he may be certainly whether solvent or insolvent.

One of the Questions is a Question of Law: as to the Effect of the Change of the Security pending the Course of the Imprisonment. Suppose a Debt by simple Contract converted into a Judgment: when that is compared to a Bond taken, which goes for nothing, if there was an antecedent Act of Bankruptcy, this Distinction occurs; that the one is by Contract: the other by a Judgment *in initium*. Whatever could be made of that, there was an Opportunity of submitting it to a Court of Law; and on a Motion for a new Trial the Court was satisfied with the Verdict; and refused to disturb it. Upon the Application to me, that followed, my Opinion was, and continues, that according to the Course in Bankruptcy, if a Commission has been sustained in an Action, directed for the Purpose of trying its Validity, it must without other Grounds be considered valid: at the same Time intimating, that, though I would not restrain the Bankrupt from again trying it, as acting in that vexatious and litigious Course, which in *Thompson's Case (a)* called for such Interposition, I would not direct the Action to be again tried without a new Ground. The Consequence would be repeated Ap-

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(a) See *Chambers v. Thompson*, 4 Bro. C. C. 434.  
plications;

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to dispute the Act of Bankruptcy ; referring to *Willcock v. Smith* (a) and *Radmore v. Gould* (b).

Sir *Samuel Romilly* resisted the Motion on the Ground, that the Bankruptcy had repeatedly been tried both at Law and in Attempts to supersede the Commission : but every Attempt to impeach this Commission had failed ; and therefore some special Circumstances ought to be stated to induce the Court to grant this Indulgence.

### *The Lord CHANCELLOR.*

It is the Practice of the Court of King's Bench, if the Justice of the Case requires it, to withdraw the Plea, and file a new one, giving Notice ; and the Court of Exchequer followed that ; requiring this additional Allegation in the Affidavit ; that the Deponent is informed and believes, that it is essential to the Justice of the Case, that the Defendant shall be at Liberty so to object.

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The Order was pronounced accordingly with that Allegation.

(a) 2 Campb. p. 184. See (b) 1 Wightw. Exch. Ca. also *Clarkson v. Dadds*, in p. 80.  
the Note.

MONDEY v. MONDEY.

1813.  
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THE Plaintiff, as Mortgagee, filed her Bill against the infant Heir of the Mortgagor, and other rected, in case Persons, claiming to be first Mortgagees. The Bill the Mortgagees prayed, that the Plaintiff may redeem the Mortgagees, if prior; and that the Heir may then redeem the whole; or that the Defendant Mortgagees, if subsequent, may redeem the Plaintiff; or that all the Defendants may be foreclosed; or that the mortgaged Property may be sold, all proper Parties concurring, and the Money to arise by gator. the Sale be applied in Payment of the Money due to the Plaintiff and the Mortgagees Defendants in respect of their Securities according to the Priorities of such Securities; and that the Surplus, if any, produced by the Sale, may be secured for the Benefit of the Defendant, the infant Heir of the Mortgagor.

Mr. Hart, and Mr. Dowdeswell, for the Plaintiff, prayed a Sale; observing, that though they could not produce an Instance, this might perhaps be done; as the Court had in many Respects extended its Jurisdiction for the Benefit of Infants.

Mr. Uterson, for the infant Heir. Mr. Collinson, for the other Mortgagees.

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It would be too much to let an Infant be foreclosed; when, if the Mortgagee will consent to a Sale, a Surplus may be got, of perhaps £4000, considered as real Estate, for the Benefit of the Infant. If there was no Precedent,

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cedent, I would make One : but I am sure, this has been done.

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The Decree directed a Reference to the Master to take an Account of the Monies, due to the several Incumbrancers ; and to ascertain and report their several Priorities ; with the usual Directions for the subsequent Incumbrancers to redeem the prior in the usual Course ; and, in case the Mortgagees shall consent to a Sale, that the Master shall inquire, and report, whether it will be for the Benefit of the Infant, that the Estate should be sold ; and farther Directions and Costs were reserved.

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## BALMANNO v. LUMLEY.

Reference of Title before Answer : Plaintiff, the Vendor undertaking to do all such Acts for the Purpose of executing what the Court thinks right, as if the Answer was in, and the Cause brought to Hearing.

THE Bill prayed the specific Performance of a Contract for the Purchase of an Estate.

Mr. Hart, for the Plaintiff, the Vendor, moved for Reference of the Title.

Mr. Cooke, for the Defendant, the Purchaser, objected, that this is never done before Answer ; and Practice would be inconvenient ; the Answer stating Grounds of Objection to the Title.

Mr. Hart, in Reply, said, that the Bill was a ~~memorandum~~ Averment of the Contract ; putting no special ~~facta~~

Direction, if the Report shall be against the Title, for Compensation : refused as to Indemnity.

in Issue: therefore there was no Use in waiting for the Answer.

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One Difficulty, stated by Mr. Cooke is, how the Court is to proceed afterwards: but on such a Motion the Court considers the Plaintiff as undertaking to do all such Acts for the Purpose of executing what the Court thinks right, as if the Answer was in, and the Cause brought to Hearing. With that Undertaking, if they cannot state any Objection to the Performance, and the Reference is merely to look into the Title, I do not apprehend the Answer to be necessary before that Reference.

Let the Order go therefore, with that Undertaking (*a*).

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Mr. Cooke desired to add to the Order a Direction, in case the Report should be against the Title, for Compensation and Indemnity; suggesting, that as to Part of the State Indemnity might be more convenient than Compensation.

Mr. Hart agreed to the Inquiry as to Compensation; but objected as to an Indemnity; which might prove inconvenient to Families; insisting, that the Purchaser must either take the Title with an Allowance for a Deficit, or reject it.

*The Lord CHANCELLOR* said, he did not apprehend, the Court could compel the Purchaser to take an Indemnity, or the Vendor to give it; and accordingly confined the Order to Compensation.

(*a*) *Paton v. Rogers, post.*

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General Right of Corporations, of whatever Nature, at Law to alienate their Lands, held in Fee, subject as to Ecclesiastical Corporations to the restraining Statutes; and no Instance of a Trust attached upon the Ground of Misapplication, as not to Corporate Purposes, except the Case of Corporations, holding to Charitable Uses.

THE Object of this Bill was, that Indentures Lease and Release, dated the 26th and 27th July, 1791, being a Mortgage for £2000 and Interest a Bond, of the same Date, as a collateral Security, another Indenture, dated the 28th of January, 1804, alledged to have been executed under the Corporate Seal of Colchester, might be declared void, and delivered up to be cancelled or declared to stand only as a Security for such Sums as were *bona fide* advanced by the Defendant for the Use of the Plaintiffs; and an Injunction.

The Bill impeached the Securities of the 26th and 27th of July, 1791, as unjustly obtained; and without any good or legal Consideration; alledging, that by the Custom or Usage of the Borough none of the Lands, vested in the Mayor and Commonalty, can be sold or mortgaged without the Consent of the Mayor and Commonalty in Common Hall assembled, or the major Part of them; a Custom invariably adhered to since the Charter.

Whether such a Jurisdiction prevails in other Cases, upon an Application to Purposes clearly not Corporate, Quare. A Bill on that Ground impeaching Securities as obtained under an Abuse of Trust by the select Body of the Corporation of Colchester, using the Common Seal for raising Money to defray the Expence of Actions against the Mayor and Town Clerk, relative to Elections of the Recorder and a Representative of the Borough in Parliament, dismissed upon various subsequent Transactions, especially an Award, binding the Corporation at large through the select Body, acting with Authority, and upon a fair Question, whether the Purpose was Corporate, or not. Costs upon a groundless Imputation of Fraud.

of Incorporation in 1763, except in the Instance of these Securities ; to which, contrary to such Custom, the Common Seal was affixed by the Contrivance of *Francis Sythies*, then Town Clerk of the Borough, whose Agent the Defendant was, in a clandestine Manner, without the Consent of the Mayor and Commonalty in Common Hall assembled.

The Bill farther alledged, that of the Sum of £2000, stated in the Indenture of 27th of July, 1791, to be advanced and paid by the Defendant to the Chamberlain for the Use of the Corporation, no Part was advanced ; but the real Consideration was a Bill of Costs to that amount in defending, as Agent of *Sythies*, a Quo Warranto Information, filed against him in 1788 for exercising the Office of Recorder of the Borough, and other Officess and Prosecutions, originating in Election and Party purposes, and not connected with the Rights and Interests of the Corporation.

To this Bill the Defendant put in a Plea and Answer ; regarding the Indentures and Bond of the 26th and 27th of July, 1791 : a Reference and Award in 1801 between the Plaintiffs and Defendant concerning the Principal and Interest, secured by those Securities, that the Plaintiffs would pay the Defendant £2266: 15s. and a Deed, dated 28th of January, 1804, confirming the Mortgage of 91 ; and by way of Answer stating, that all the Circumstances, under which the Mortgage was obtained, and the true Consideration thereof, were laid before the Arbitrators.

The Plea was disallowed by the Lord Chancellor as averring too much in covering the last Instrument.

The Defendant then put in his Answer ; from which it appeared, that he had lately filed a Bill against the

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Plaintiffs for a Foreclosure. He denied the Custom, as stated by the Plaintiffs; alledging, that the select Body of the Corporation, consisting of the Mayor, Aldermen, Assistants and Common Council, which Common Council consisting of Eighteen were elected by and out of the Commonalty at large, who were upwards of One Thousand Three Hundred, have full Power to sell mortgage the Corporation Lands without the Consent of the Commonalty at large, in Common Hall assembled. He denied, that the Common Seal was affixed to the Mortgage contrary to the Usage by the Contrivance *Smythies* in a clandestine or improper Manner; admitting, that it was affixed without the Consent of the Mayor and Commonalty, in Common Hall assembled, or the major Part of them; which he insisted was not necessary. He admitted, that the £2000 was not advanced to the Chamberlain for the Use of the Corporation; but arose in the following Manner:—In 1787 upon an Election for the Office of Recorder *Smythies* was returned as duly elected. In consequence of the Warmth, occasioned by this Contest, many Actions were brought against *Edward Capstack*, the Mayor, for refusing Votes, tendered for Mr. *Grimwood*, the unsuccessful Candidate; who applied to the Court of King's Bench for Leave to file an Information in the Nature of a *Quo Warranto* against *Smythies*; which was terminated by a Compromise: Mr. *Grimwood* being sworn into the Office of Recorder, and *Smythies* being appointed Town Clerk. In 1788 upon the Election of a Representative of the Borough in Parliament Mr. *Tierney* and Mr. *Jackson* being the Candidates, *Bezaliel Angier*, the Mayor, made a special Return, that the Numbers on the Poll were equal; and Mr. *Tierney* commenced an Action against him for a false Return.

On the 20th of *July*, 1789, at a Meeting of the select Body of the Corporation, consisting of the Mayor, Aldermen, Assistants, and Common Council, an Order was made; reciting, that such Actions had been commenced, and the Opinion of the Assembly, that *Capstack* and *An-gier* had executed the Office of Mayor faithfully and honestly; and therefore resolving, that they should be protected, defended, and indemnified, by the Corporation by and out of the Revenues thereof against such Suits; and, for better carrying that Order into Effect, that the Mayor for the Time being together with any Two of the Aldermen, any Two of the Assistants, and any Two of the Common Council, be a Committee for the Purpose of borrowing a Sum, not exceeding £2000, for answering the above End; such Committee being authorized to raise the £2000 by Mortgage of the Estates of the Corporation; and to affix the Common Seal to all Deeds, necessary for effecting such Purpose. On the 18th of *December*, 1789, at another Meeting of the select Body it was ordered, that they should make such Return to the *Mandamus*, requiring them to swear Mr. *Grimwood* into the Office of Recorder, as Counsel should advise; in order that the Election might be tried; that it should be tried at the Expence of the Corporation; that the Mayor should be indemnified by the Corporation; that the Defendant should be employed to conduct this Business; and that the Costs of defending the *Quo Warranto* Cause against *Smythies* should be borne by the Corporation.

The Answer farther stated, that in prosecuting and defending these Causes, £2156:6s.:11d. became due to the Defendant; of which Sum £1400 was Money out of Pocket; and his Bill of Costs on that Account was the Consideration for his Mortgage; which he insisted came within the Spirit of the preceding Orders.

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The Interest was regularly remitted to the Defendant by *Smythies* during his Life; but since his Death in 1798 no Interest having been paid, the Defendant applied for his Money, and the Plaintiffs disputing the Bills, a long Correspondence ensued; which terminated in an Agreement for a Reference of the Defendant's Claims, dated the 22d of April, 1801, signed and sealed by the Defendant; and sealed on the Part of the Plaintiffs with the Common Seal; which was affixed by the Direction of the select Body.

The Defendant insisted, that all the Objections to his Security, as stated in the Bill, were laid before the Arbitrators in a Case, drawn up by the Town Clerk on behalf of the Corporation; and by the Award, dated the 24th of December, 1801, the Sum of £2266: 15s. was found to be due from the Plaintiffs to the Defendant. That Sum not being paid, the Defendant, in Trinity Term, 1803, filed a Bill for Redemption against a prior Mortgagee and Foreclosure against the Corporation; but consented to stay Proceedings in that Suit for Two Years on receiving the Interest then due, and an Agreement, that such Delay should not prejudice the Suit, and that the future Interest should be increased from £4: 10s. to Five per Cent.

In pursuance of that Agreement by an Indenture, dated the 28th of January, 1804, indorsed on the original Mortgage, the Mayor and Commonalty in Consideration of the Sum of £2266: 15s. which they acknowledged to be due from them to the Defendant, granted and confirmed to him all the Premises, comprised in his original Mortgage, to secure the principal Sum of £2266: 15s. and Interest at Five per Cent.; covenanting to pay the Interest Half-yearly, and the Principal in January, 1806. The Interest not being paid, the Defendant commenced an Action upon his Bond; and obtained a Verdict.

The

he Answer insisted, that the Debt so owing to the Plaintiff for his Bill of Costs, was a legal and sufficient Consideration for the Bond and Mortgage; that such Bond and Mortgage were valid and binding on the Corporation notwithstanding the Objection as to the Mode of fixing the Corporate Seal; that, if the original Sealies were questionable, they had been since repeatedly confirmed by the Award, the Deed of 1804, the subsequent Payment of Interest, and the Orders and Admissions of the select Body; all which Acts took place with Concurrence of the Recorder, the proper Law-Officer of the Corporation; and were Corporate Acts, binding the Corporation.

In the 12th of March, 1811, the Lord Chancellor issued Four Issues, to be tried in the Court of Exchequer: Whether the Common Seal of the Mayor and Commonalty was duly and lawfully affixed to the Indenture dated the 26th and 27th July, 1791, the Bond, the 27th of July, 1791, the Agreement, dated the 2nd of April, 1801, and the Indenture, dated the 28th January, 1804, or to any or either of those Instruments.

On the Trial of those Issues the Jury found, that the Common Seal of the Mayor and Commonalty was duly and lawfully affixed to the said several Indentures, Bond, Agreement.

The Cause was heard for further Directions.

Samuel Romilly, Mr. Hart, and Mr. Roupell, for Plaintiffs.

I. Corporations are Trustees for the Individuals, of whom they are composed; and in that Character are bound

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bound to consult the Interest of their Members. If those, who act on behalf of the Corporation, cannot apply the Funds of the Body to their own individual Advantage, neither can they appropriate those Funds to gratify their Passions, or to serve the Purposes of their own particular Party. In the View of a Court of Equity such Objects must receive equal Censure. It is not very probable, that Cases in Point can be produced: Corporations generally contriving to veil their Abuses from the Observation of Justice. Yet, if Authority is required, the Case of *The King v. Watson* (a), furnishes a clear Opinion of *Ashurst*, Justice, in Favor of this Jurisdiction: a Judge, perfectly conversant with the Doctrines of this Court; having sat only Five Years before as one of the Lords Commissioners of the Great Seal. This cannot be represented as a Bill, filed by a Corporation to defeat their own Acts. The Transactions complained of are Acts, not of the Corporation, but of the select Body; affixing the Common Seal to Instruments, which, though good at Law, may be the proper Subject of Relief in Equity; as Relief would be given against a Party, claiming with Notice under a fraudulent Execution of a legal Power of Attorney to execute a Deed.

The Defendant knew, that the Mortgage was granted for Purposes, in which the Corporation had no Interest; and, that the Mortgage, if in the strict legal Sense valid, amounted to a Breach of Trust. He admits, that the Consideration was, not Money advanced, but a Debt. Here the Question arises, whether that was a Debt, which the Corporation ought to have paid. The Charges respecting the Contest for the Recordership, and the Actions resulting from the Mayor's Return at the Election, constitute a very large Part of this Debt. The

(a) 2 Term Rep. 199. See Page 204.

Contest

The Recordership was one purely individual; so Candidates only, and with which the Majority had no Concern. It would have been a Person, not elected by the Majority, but by the Corporate Body. Resisting COMMONALTY I have been asserting their own Right of a Minority, having accidentally, and availing themselves of the Election of the Mayor, the select Body was a Nullity; upon by their Acquiescence confirmed it to third Persons.

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ing, that the Corporation at large possessed the Power to dispose of the Funds, belonging to their Body, could give no such Right to a Minority so to act at the absence of the whole Corporation. Suppose the Mayor, in Possession of a Fund, proposed to apply it to the Payment of such a Bill as this: could not the Corporation at large, or the Majority, obtain an Injunction to restrain him from paying and the other Party from receiving it? The same reasoning applies to the Actions against the Mayor. They were purely personal Actions, and the Corporation had not the Power of applying the Funds to cover the Expences of those Actions; as a clear Misapplication; and the Defendant in the character of Solicitor and Agent to the Town Clerk could not be ignorant of it. By the express Terms of Trust the Funds of the Corporate Body are to be applied only to public Purposes; and by what Course of Reasoning can these Objects be so described?

Haley v. The Whitstable Company (a) your Lordship putting the Case of a By-law, made for the per-

(a) 17 Ves. 315. See Pages 320, 322.

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sonal Benefit of the Individuals making it, excluding the other Members from a Participation in the Profits, which all were entitled, declared your Opinion in Favour of the Jurisdiction of this Court to controul such an Exercise of even a legal Right; and how much stronger is the Case here presented: this unauthorized Attempt of the Minority to dictate to the Majority; to act for the whole Body, and dispose of the Funds by an arbitrary Discretion, independent of all Controul. The Defendant's Security must be set aside as granted without Consideration. It admits Notice, that the Seal was affixed without the Consent of the Mayor and Commonalty at large; and that the Money was not advanced, as falsely recited in the Instruments. The Acts, represented as a Confirmation, will stand in the same Predicament as the original Security; being Acts done by the select Body, equally unauthorized.

If this Mortgage can stand, there is no Purpose, however corrupt, to which the Funds of a Corporation may not be applied. Conceding for the Argument that the select Body had the legal Power to affix the Seal, yet under the Circumstances, with the Defendant's Knowledge, that the Purpose was corrupt, and not Corporate, his Security cannot be allowed to prevail.

*Sir Arthur Piggott, Mr. Richards, Mr. Wetherell, and Mr. Horne,* for the Defendant.

The Argument in support of this Bill opens to this Court a most extended Jurisdiction. The Plaintiffs, abandoning their original Position, that the Deeds were illegal, now call for the Interference of this Court to have them removed, as Clouds upon their Title.

The

The Corporation is the sole Plaintiff: no individual members impeaching the Conduct of the select Body. that respect this Case is distinguished from *Adley v. Whitstable Company*; where the Plaintiff asserted, & having performed his Duty by dredging the Oysters, was under the By-law excluded from a Share of the Suits; and your Lordship directed an Action to try the Validity of that By-law; which was the whole Jurisdiction exercised in that Case. The Security, given by the select Body, is the Security of the Corporation. The Power making Laws, binding this Corporation, is in the select Body. That has been repeatedly established, by the Court of King's Bench in the Action upon the Bond, and the Court of Exchequer in the Trial of the Issues dictated. This Power appears to have been vested in the select Body from Time immemorial; being derived to them by Prescription, not by Charter; and innumerable Instances, in which the select Body has mortgaged Property of the Corporation, and exercised other Powers of Government, without the Interference of the Bursars. The equitable Object of this Bill is to set aside Instruments of the Plaintiffs themselves, decided to be null Instruments; and the Principle, on which that is intimated, is, that the Corporation are Trustees: the Plaintiffs alledging any Trust; but stating a general Proposition, that will entitle every Corporation in the Kingdom by merely filing a Bill, stating no more than that no Act not Corporate has been done, to set aside their Extravagant Acts, defeat their Engagements, and evade their Debts. It is admitted, that there is no Instance of such a Suit.

The Plaintiffs cannot maintain, that the Corporation have no Interest in the Appointment of the Recorder, or Law Adviser; and if the Mayor is to stand the Consequences

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sequences of every Action, brought against him in that Character, he may be overwhelmed. The Proceedings against these Officers were against them, not as individuals, but in their official Characters; and why, may not the Corporation defend any Member, attacked in his Corporate Character, for Acts, done in the Execution of his Office? Could this Defendant know, whether the Purposes, for which the Money was employed, were Corporate or not; and is he at this Distance of Time, when all the Individuals, against whom he might have proceeded, are dead, to lose the Security, upon which he was induced to rely? At least he must be entitled to the common Justice, which a Court of Equity administers; where Relief is sought. The usual Practice of the Court is, when any one comes here to set aside a Deed fraudulent, or illegal, as being usurious to impose this Term upon the Plaintiff, that he shall repay the Money actually disbursed.

Whatever were the original Circumstances, here are the strongest Acts of Confirmation: Payment of Interest to the Year 1797: the Agreement to refer; by which they chose the Forum; and the Deed of 1804. In all Cases a Party, having a Right to extricate himself, if, aware of the Objection, he confirms the original Act, cannot afterwards avail himself of that Objection. Whence do these Plaintiffs derive the Privilege of laying by for so many Years? The only Authority referred to is an Opinion accidentally dropped by a single Judge, sitting in a Court of Law. Can such an Opinion be received as conclusive Evidence of the Doctrine of this Court upon a Subject peculiarly its own?

Supposing, that this Money was not raised for Corporate Purposes, that this is therefore to be considered as a Misapplication,

a Misapplication, the Question would arise, whether this Court could shortly after the Mortgage have restrained the Defendant in the Exercise of his legal Rights, as Mortgagee; or have directed the Instrument to be cancelled. That is certainly a Question of great Novelty, and no less Importance; involving another Question, the Competency, or Incompetency of Corporations to dispose of their Property. From Time immemorial we find it laid down by all the Courts of Law, that Grants by Corporations of their Estates, whether for Corporate Purposes, or not, were good (a). Lord Coke, indeed, does not hesitate to lay down, that any Corporation, ecclesiastical or civil, might alienate, and that without the Patron or Founder.

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Independent of the restraining Statutes of *Elizabeth* (b) Corporations could dispose of the whole of their Estates; having the absolute and unqualified *jus disponendi*; neither limited as to the Objects, nor circumscribed as to the Quantity; and the Proposition of the Plaintiffs is, that this unqualified Power which Corporations possess at Law, may be cut down in this Court. So incidental to a Corporation, lay or ecclesiastical, is this Power of free Alienation, that the Crown cannot constitute a Corporation without it; according to the celebrated Case of *Sutton's Hospital* (c): so that, if a Corporation should be constituted, to alien with the Consent of the *Lord Chancellor of England*, the Qualification would be void. The *Dictum* of Mr. Justice *Ashhurst* is opposed by the Opinion of Mr. Justice *Blackstone*, that the visitatorial Power of the Crown over Civil Corporations is exercised in the

(a) *Co. Litt. 44, a. 300, b. c. 10. 14 Eliz. c. 11 & 14. Siderfin, 162. Smith v. Bartet, 3 Comyn's Dig. Tit. Franchise, s. 11. 18.* 18 Eliz. c. 11, and 43 Eliz. c. 29.

(c) 10 Co. 1. See 306.

(b) 1 Eliz. c. 19. 13 Eliz.

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Court of King's Bench (*a*), and there only. In the *Banker's Case* (*b*) the Opinion of Holt, C. J. is at Variance with that of Justice *Ashhurst*. The Silence of all the Authorities is conclusive, that there is no visitatorial Power in a Court of Equity. It is singular, if a Corporation, taking liable to a Trust, cannot alienate, that it should have escaped Lord Somers; who heard the *Banker's Case*. The Result of all the Authorities is, that the Alienation of a Corporation is as binding in Equity as at Law. The Statute of Charitable Uses (*c*), which has been supposed to create the Jurisdiction of this Court, contains nothing, which supports it: nor, is there in *Duke's Book* (*d*) an Instance of a Commission to enquire after Estates, alienated by Corporations; a strong Argument, that this Court has no visitatorial Power.

It is not judicially apparent, however, that the Corporation committed any Breach of Trust in supporting the Mayor or Recorder; nor whether such were or were not Corporate Purposes, and the Jurisdiction of this Court can only be exercised, when that is ascertained. The Proposition of the Plaintiffs admits, that a Corporation may mortgage, or alienate, for Corporate Purposes: but the Jurisdiction, if it depends upon the Nature of the Purpose, as not being Corporate, must attach upon any Corporate Expenditure; as building Bridges, &c. = a

(*a*) 1 Comm. 480, 481. This Opinion is controverted by Mr. Christian; who distinguishes the Power of the Court of King's Bench upon Complaint to prevent and punish Injustice in Civil Corporations from visitatorial Power; as not only liable to

Reversal by Writ of Error, but also wanting an essential Ingredient, the Discretion voluntarily to regulate and superintend.

(*b*) Skinn. Rep. 602.

(*c*) 43 Eliz. c. 4.

(*d*) The Law of Charitable Uses.

Doctrine,

Doctrine, which goes to the utter Extinction of the Principle, on which all Corporations are founded; and gives this Court an equal Power over Civil Corporations as it exercises over Charitable Uses, in Opposition to the Principle, that in all Corporations there is somewhere vested an absolute, uncontrollable, Power and Discretion, without Appeal. It will scarcely be contended, that the Corporation could not submit to Arbitration. That Right they clearly have under the *Statute of William* (a): even if at the Trial in the Court of *Exchequer* many Instances of the select Body submitting by their Seal to Arbitration, and even borrowing Money to defend Law Suits, had not been produced. Supposing the original Security invalid, what is there to impeach the Award, or invalidate the Debt thereby created? Conceding for the Sake of Argument, that the Jurisdiction exists, may not a Corporation by Confirmation or Waiver be precluded from the Right of resorting to it?

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*Sir Samuel Romilly, in Reply.*

In this Cause, certainly of very great Importance, involving Points of considerable Weight, the Defence brings forward Four Questions: first, whether this Court has Jurisdiction: secondly, whether this Money was applied for Corporate Purposes: thirdly, whether the Acts, relied on as a Confirmation, preclude the Relief: and fourthly, whether any Relief can be given against the Defendant, as a Stranger, and a Purchaser for valuable Consideration. With respect to the first Point the Defendant contends, that this Court has no Jurisdiction for a direct Breach of Trust; a corrupt Misapplication of the Funds of this Corporation. The Absence of Authority can never be conclusive against the clear and obvious Principles, on which

(a) 9 & 10 W. & C. 15.

this

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this Jurisdiction stands. Admitting, that a Corporation has by Law the Power of Alienation, that the Crown cannot constitute a Corporation without that Power, as incident to their Fee, no Authority upon that Head proves, that Courts of Equity have no Jurisdiction, let the Application of the Corporate Property be what it may; and the numerous Decisions, correcting Breaches of Trust, are Authorities in support of it. If, where the visitatorial Power exists, this Jurisdiction is excluded, the Presumption is, that it attaches, where there is no such Power. The Jurisdiction cannot be derived from the Act of *Elizabeth* (a); which directs the Appointment of Commissioners. The select Body is established by the Decision at Law to be Trustees, mere ministerial Agents of the Corporation; and as such bound to exercise their Powers for the Benefit of the whole Body. The Objects of Incorporation are to preserve Peace, to administer Justice, &c. in order to promote the general good, not of the Corporation alone, but of the Kingdom at large: His Majesty granting these Corporate Privileges as a Trustee for the whole public Weal. The Consequence is, that the select Body can act only for the general good.

Suppose, the restraining Statute of *Elizabeth* had never passed, and that a Bishop had in the present Day made a beneficial Grant to one of his Family, can a Doubt be suggested, whether this Court would have interfered? Considerable Weight, is to be attached to the Opinion of Mr. Justice *Ashhurst*; who speaks of this as a general Principle, merely necessary to be stated, in order to be admitted, and not requiring any Authority to confirm it.

The Distinction between charitable and public Trusts is so nice and refined, that it can be scarcely be followed.

(a) Stat. 43 Eliz. c. 4.

It

It is sufficient, that this is a Corporation for public Purposes. The Issues having decided these Instruments to be good at Law, the Plaintiffs are now entitled to a Relief, different from that originally prayed, that the legal Estate may be re-conveyed.

The Question, whether the Money was raised for Corporate Purposes, depends upon the Interest, which the Corporation had in the Dispute concerning the Election of a Recorder, and the Actions against the Mayor. The Election of Recorder is in all the Burgesses; and the Corporation at large had an Interest to have the Person returned, who was duly elected; but had no farther Interest in the Success of either Candidate. How then can it be maintained, that this Act of the select Body, including the Mayor, who ought to have been impartial, supported by the Prejudices of one Part of the Corporation against the other, was a proper Application of the Funds to Corporate Purposes? If such an Application of them can be sustained, why not for a similar Purpose previous to an Election: for Instance, to defray the travelling Expences of Electors, coming to vote for the Candidate, favored by the select Body, to represent the Borough in Parliament?

The Acts, set up as a Confirmation, are no more than the Acts of the select Body, corroborating the Acts of the select Body: not the Acts of the Corporation at large; who alone were capable of confirming these Securities. The Confirmation of the select Body, unless they can be considered as the Corporation, is as unavailing as the Confirmation of a Deed, impeached for Intoxication, by an Act of the Party, while in the same State; tainted by the Vice of the original Transaction. The Right of any individual Member to complain is not inconsistent with a

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similar Right in the whole Corporation. The Bank Case affords no Authority against the Jurisdiction in such a Case as this: the Application by this select Body of Funds of the Corporation to Purposes, adverse to the general Interests: an Abuse of Trust: a Breach of F = and public Duty, that must go unredressed, a signal instance of a compleat Failure of Justice, unless this C applies the Remedy.

Jan. 20.

The Lord CHANCELLOR,

Stating the Circumstances particularly, pronounced the following Judgment.

I have no Recollection of any Case of this kind except one: a Suit, instituted in this Court upon a Bill by some of the Corporation of Alnwick against the Body, the acting Part of that Corporation, very much of this Nature: but I do not know what became of it.

The Bill in this Cause contends, that all or Part the Expenditure, which is the Subject of this Suit, was not for Corporate Purposes; and, if not, that it was competent to the select Body to charge the Corporation with an Expenditure, not for Corporate Purposes; the Property of the Corporation is held by them in for Corporate Purposes; and therefore the select Body they have the Capacity of acting, could not pledge the Property of the Corporation for Purposes, not corporate at least not without the Assent of the Body at large upon that Hypothesis they might go farther; and that the Body itself could not pledge the Property of the Corporation for Purposes, not corporate.

In answer to the Claim of Relief on that C

said, there are a great Variety of subsequent Transactions; and, if ever there was a Case, in which subsequent Dealings could set right what was originally wrong, if this can be so characterized, this is that Case: this Defendant having been, either with or without the Assent and Knowledge of the Body at large, dealing with the select Body, with a View to an amicable Settlement, by a vast Number of Transactions, through a vast Series of Years, in every Way possible; and, if in that Object he has failed, as there is not the slightest Pretence upon this Record for saying, that he has ever dealt dishonorably, though gross Fraud is very blameably imputed to him, he has a fair Claim to urge, that, if the subsequent Transactions are unavailing, he sustains considerable Hardship in losing all the Remedies for his Advances, Labor and Time, to which he would have been entitled; as, if he cannot establish his Demand against the Corporation, with regard to a great Proportion of it he might have established it against *Smythies*; and if the select Body pledged to him the Funds of the Corporation for Purposes, to which they could not be applied, they would themselves have been personally answerable to him. All that however is gone by.

It is now insisted upon the subsequent Transactions, that, as they passed between the select Body and *Lowten*, they cannot have the Effect he contends for. When this Cause came originally before me, the first Question appeared to be, what was the Species of Relief to be given, if any Relief was due to the Plaintiffs; and it was then contended for the Corporation, that, notwithstanding what passed at the Trial of the Action upon the Bond, as to the Use of the Corporation Seal, the Mortgage, the Bond, and the Deed, as it is called, of Confirmation, and the Submission to Award, are all good for nothing: a Use having been made of the Corporate Seal, authorizing the Plain-

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tiffs to say, that these are not Corporate Instruments; and, if that Allegation can be made out, there is a clear Title to Relief: my Opinion having always been, differing from others, that a Court of Equity has the Jurisdiction and Duty to order a void Deed to be delivered up, and placed with those, whose Property may be affected by it, if it remains in other Hands.

Issues were therefore directed; and all these Instruments were found to be Instruments, amounting to valid Alienations of Corporate Property: in other Words it was found, that the Seal was legally and duly affixed to them: I say “duly;” having either suggested, or acceded to the Suggestion, that this Word should be inserted; that it should be open to the Parties to try, whether any Thing could be made of it.

The Relief, now to be asked, must therefore be upon quite a different Principle; and though all the Authorities upon what is not often the Subject of Consideration here, have been most usefully brought forward, I have no Doubt, that, independent of positive Law, as to the legal Powers of a Corporation, Corporations, Civil, Ecclesiastical, or of whatsoever Nature, could in Point of Law alienate Lands, of which they were seised in Fee; and the History of what Corporations, both aggregate and sole, did before the restraining Statutes is very useful. Civil Corporations are at this Day in the constant Habit of making those Alienations: their Title to make which is asserted by Lord Coke. In the Course of my Experience in this Court, of my present Researches, and of my Examination of Authorities, which, having had Occasion to consider them formerly, this Cause has brought back to my Recollection, nothing has occurred, shewing, that there ever was a Case, in which this Court attached the Doctrine of Trust, as applied under the Words, “Corporate
“ Purposes”

"Purposes" to the Alienation of a Civil, or indeed of an Ecclesiastical, Corporation. With regard to what was stated by Sir *William Ashurst*, a very respectable Judge, and who, I take this Opportunity of saying, was a very useful Judge as a Commissioner in this Court, I do not lay down, either that this is the Subject of Jurisdiction here, as Trust, or of Information in the Court of *King's Bench*. The Opinion, that this Court has Jurisdiction, is to be considered as the Opinion, not only of Sir *William Ashurst*, but of the whole Court of *King's Bench*; stopping upon that Ground the Argument upon the Point as to the Breach of Trust (a). Sir *Samuel Romilly* has put it fairly, that the Court is not to act upon the Supposition, that Corporations are constantly abusing their Duty by applying the Property not to Corporate Purposes; but on the other Hand, when a Case is brought forward, the Court is not to shut its Eyes against the Practice, that has prevailed in all Times, and the Judgment upon it; for, speaking of Corporate Purposes, if the Purpose, though the most worthy, that can be represented, has not that Character, the Use of the Seal is equally improper, and as much an Abuse in a Court of Justice, though not in moral Consideration. As to what obtains, for Instance, in the Ecclesiastical Bodies, that have been mentioned: the Bishop, the Dean and Chapter, &c., the Statutes, that Leases for more than Twenty-one Years, or Three Lives, and not at the old Rent, or more, shall be bad, do not say, that any Lease shall be good, which can be taken to be an Abuse of those Corporate Purposes, for which the Property was held; and I apprehend, it would not be difficult now to find Bishop's Estates, the old Rent reserved being £50, and the actual Estate worth, £1000 or £2000 per Annum. All the Excess of that Rent, taken by the Bishop himself, should, if he is a Trustee in a fair Sense, be taken from

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(a) 2 Term Rep. 200. Lord *Mansfield* was absent.

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him by this Court: yet no such Attempt was ever made where the Corporation was not holding for Charitable Purposes. Even those Corporations can alienate at Law: but the Alienee will be a Trustee; and the Jurisdiction in those Cases must be regarded as a Contrast to the other Cases of Corporations, holding not for Charitable, but for Corporate, Purposes; demonstrating, that this Court shall not be called upon in the latter Case; as it is in the former.

The next Point I am called upon to consider is, whether these are Corporate Purposes. The *Attorney-General* of that Day seemed to think the Mortgage good as to so much of *Lowten's* Bill as was incurred under the Authority of the select Body. That however is but private Opinion; and the Question is still open, whether that was a Corporate Purpose, or not. It is not necessary for me to determine, how many of the Purposes, where the Defendant was employed either by the express Authority of the Corporation, or by *Smythies*, as his Client, were corporate, or not: they appear to me much nearer that Description than many Purposes, to which Corporate Property has been actually applied: but my Judgment goes upon this. Though Courts of Equity have laid down, as a Principle, upon which they ought to act, that Persons, seeking Relief, should be prompt in their Application, and should not deal as if they did not mean to make any Application for Relief in Equity, suffering their Opponents to lose their Remedies against other Parties, I do not put my Judgment upon that Principle. It would be difficult to maintain, though the Court would struggle, as far as it could judicially, that, as the Defendant has lost his Remedy by the Death of *Smythies*, and the Dispersion, if I may use that Expression, of the select Body, therefore he can in Equity have the Benefit of that Security invalid in Law and Equity, the Court would take away that Benefit.

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invalid in Law and Equity, the Court would take away that Benefit.

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rity, which is not a valid Security in Law and Equity: whether that Benefit could be taken from him by a Court of Equity is a different Consideration.

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My Opinion upon this Case is, that the subsequent Transactions, which took place between these Parties, bound the Corporation at large. Their Constitution is this. The select Body have at least a Right to bind the Corporation by the Use of the Seal in Matters, as to which the Corporation at large could bind itself. Without detailing the Circumstances from the first Moment of this Demand, all the Correspondence upon the Part of the Town Clerk, which I take to be the Correspondence of both the select Body and the Corporation, all the Terms proposed as to Part-payment, &c., it is clear, that a Corporation may submit to Arbitration. If the Matter submitted can in no fair Sense be stated as Matter of Controversy, in which the Corporation could deal, such that a fair Consideration could view as connected with Corporate Purposes, I do not say, that such a Submission would bind: but, if it may be represented as a fair Question, whether corporate, or not, the select Body, being entitled to act, may submit that to Arbitration.

This was submitted to Arbitration; and there is not a Trace in that Transaction of any Inattention, or Want of due Attention, to the Interest of the Corporation at large. The select Body must, it is true, be considered in one Sense as the same Body, whose Acts are brought in question; but in another Sense they are quite a different Body. Some of them are not the Individuals, whose Acts are brought in question; and upon Examination my Conclusion is, that they did act as Persons exerting their best Attention for the Corporation at large. Not a Point was brought before the Arbitrator otherwise than as it would have been by an Agent, having no other View

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than the Advantage of his Principal. The Award therefore is binding at Law; and was so conducted as to the Interests of the Corporation, that, unless bound to say, the Purposes, to which the Money was applied, can in no Sense be considered Corporate Purposes, I ought not to shake that Award.

Upon these Grounds I cannot give the Corporation the Relief, prayed by this Bill. The Costs of the Issues necessarily follow the Event; and this Bill imputing Fraud, when it is impossible that the Security could be cut down except upon the Principle of its Invalidity in Law or Equity, I should not do Justice in this particular Case, unless I dismissed the Bill with Costs.

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Nov. 23, 26.

1813,
Jan. 13.

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Legacy, re-
citing the Pro-
bability, that
the Legatee was

JOHN Lovelace by a Codicil to his Will, dated the 26th of November, 1796, disposed as follows: "I give unto my Son John Lovelace at Malaga in the

not living, upon express Condition, that he shall return to England and personally claim of the Executrix or in the Church Porch: if he shall not so claim within Seven Years, to be presumed dead, and the Legacy to fall into the Residue.

The Legatee not having returned, and dying abroad within Seven Years, the Legacy was held not due; the Existence of the Legatee, though appearing otherwise, being to be proved by the particular Means prescribed; and therefore not within the Cases from the Civil Law, where, the End being obtained, the Means were not essential.

Objections of Form, that the Plaintiff, originally claiming under a special Assignment, by Way of supplement set up a different Title, as genera. Creditor, proceeding as such, not upon Proof of his Debt, but on the mere Admission of the Executor, against a Person, accountable to the Executor for Assets, not determined.

" Kingdom

" Kingdom of *Spain* £2000 capital Stock, &c. Part of
 " my Stock in the Funds: but as I have not heard from
 " my said Son for a considerable Time, and there is a Pro-
 " bability that he may not be now living, I do hereby de-
 " clare my Will and Mind is, that the said Legacy is given
 " to him upon the express Condition that he shall not
 " be entitled thereto unless he shall return to *England*
 " and personally claim the same of my Executrix or her
 " Executors or Administrators or in the Church Porch
 " of the Parish Church of *Great Waltham* in the Pre-
 " sence of Two Witnesses; and in case my said Son shall
 " not return to *England* and claim the said Legacy in
 " Manner aforesaid within the Space of Seven Years
 " from the Time of my Decease then my Will and
 " Meaning is that he shall be presumed to be dead and
 " in such Case the said Legacy hereby given to him shall
 " be deemed a lapsed Legacy and sink into and become
 " a Part of the *Residuum* of my personal Estate; and I
 " hereby will and direct that the said Legacy shall be con-
 " tinued in the *Bank* by my Executrix for the Time
 " aforesaid after my Decease until sufficient Proof of the
 " Death of my said Son shall be produced or such
 " Claim thereof shall be made in Manner aforesaid
 " within that Period; and that the Dividends which shall
 " from time to time become due thereon shall be re-
 " ceived and vested in the same Fund to accumulate
 " together with the Dividends, which shall become due
 " upon such accumulated Fund for the Benefit of my
 " said Son, in case he shall make his Claim thereto in
 " Manner and within the Period aforesaid, or otherwise.
 " of my residuary Legatee."

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The Testator died in *March*, 1797. *John Lovelace*, the Legatee, died at *Malaga* in *October*, 1803; at which Place he was residing at the Date of the Codicil, and when the Testator died, and continued to reside until his

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Death, never having returned to *England*, or personally claimed the Legacy; although he was apprised of it by Letter, dated the 16th of June, 1797, transmitting a Copy of the Will; the Receipt of which he acknowledged, expressing his Intention of coming to *England*, when his Affairs permitted him; and it was proved, that he died of the Yellow Fever just as he was embarking for that Purpose.

The Bill was filed against the Executor of *John Lovelace*, the Legatee, and against the residuary Legatee of the original Testator *John Lovelace*, who claimed the Legacy, as having fallen into the Residue. The Plaintiff by his original Bill set up a Claim under an Assignment to him of this Legacy from *Lovelace*, the Legatee; but afterwards filed another Bill, by Way of Supplement asserting his Title as a Creditor, suing on behalf of himself and all the other Creditors of *John Lovelace*, the Legatee. The Executor admitted the Debt; but did not admit Assets.

Mr. Leach, and Mr. Boteler, for the Plaintiff.

The substantial Part of the Condition, annexed to this Legacy, having taken Effect, the Appearance of the Legatee in the Church Porch is a Circumstance, that even in a Court of Law would not prevent the Legacy's vesting; and is therefore more clearly to be dispensed with in Equity. What Motive can be attributed to the Testator, imposing this Condition? He assigns his Reason, leaving no Doubt of his Object; that, if his Son should die abroad, the residuary Legatee should not be kept out of the Property a considerable Time; requiring therefore, that the Executrix shall be perfectly satisfied of the Existence of the Legatee; and pointing out the Mode of giving

giving that Satisfaction ; having no Purpose beyond that. The Executrix admits, that she was satisfied of the Existence of this Legatee by other Means, viz. the Letter received from him in 1801. How is the Declaration, that the Legatee, not claiming in Manner aforesaid within Seven Years, shall be presumed to be dead, consistent with the Notion, that there is something in the particular Mode, pointed out to satisfy the Executrix of the Fact, entitling the residuary Legatee ?

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This may be compared to the Case put by Lord Coke (*a*), of a Condition to enfeoff a particular Person, and instead of a Feoffment a Conveyance by Lease and Release executed : Lord Coke says, this in Law amounts to a Feoffment. The substantial Part is, that the Party should have the Estate ; and the Form is not essential. In *Rolle* it is said, " the Condition is performed ; for the Effect is performed." So the Substance of this Condition is, that the Executrix shall within Seven Years have Demonstration, that this Legatee was living, and she had that Demonstration. In all Cases of this Nature, Conditions as to Marriage, Powers of Revocation, &c. if the real Intention has been substantially performed, a Court of Equity does not insist on a rigid Adherence to particular Circumstances. It is evident, that the only Subject of this Testator's Contemplation was the Uncertainty of his Son's Life ; and though in the latter Part of the Clause he appears to lose Sight of the particular Means by which he intended that his Executrix should be satisfied as to the Fact, the Reason, assigned in the Introduction, over-rides the whole. In *Pearsall v. Simpson* (*b*) Words of apparent Condition were held not to have that Effect. In *Broome v. Monk* (*c*)

(*a*) Co. Lit. Estate upon Condition, 207. *a.*

(*b*) 15 Ves. 29.
(*c*) 10 Ves. 597. See 618.
your

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your Lordship expresses yourself thus: "Where there is
 " a general Direction to lay out Money in Land, the
 " Testator takes it for granted Land can be procured.
 " If a particular Estate is pointed out, he conceives a
 " Title can be made. Upon the Point, whether, that
 " failing, it may be laid out in other Lands, after a Dis-
 " ference of Opinion between Lord Thurlow and Lord
 " Rosslyn it is established, that it may; that the parti-
 " cular Estate pointed out is only the Mode directed for
 " executing the primary Intention for a Purchase."

This Claim is supported by various Analogies from the Civil Law; under which a Legacy, if the Legatee should become *sui Juris* by the Death of his Father, was considered due upon the Legatee's becoming emancipated; and Legacies to Daughters on Condition that they were emancipated, were due upon their becoming *sui Juris* by the Banishment or Death of their Father, or by other Means. *Voet (a)*, treating upon the precise Performance of Conditions, alludes to these Cases.

Another

(a) 2 *Voet ad Pandactas.*
 Lib. 28. T. 7. § 25. Sed et amplius conditiones plerumque specificie, ac ex præscripto testatoris implendæ sunt, utcunque implementum alteri utile non sit. Ilincum testator Mævio fundum legasset sub conditione, *si is decem dederit Callimachus*, cum quo non erat testamenti factio, conditioni Mævius parere debet, et decem dare, ut ad eum fundus legatus pertineat, licet numeros non faciat accipientis.

Sed nec per æquivalens conditioni parere jura regulariter permitunt. Quâ ratione, si testator opus publicum in municipio per hæredem fieri jusserrit, eumque sub hâc conditione instituerit, is autem paratus sit pecuniam dare reipublicæ, ut ipsa faciat, audiendus non est. Et qui honoratus est sub conditione, *si hæredi, vel alteri decem dederit*, cum is servus esset, ipsi servo, non domino ejus, dare debet, & vice versa, domino dare jussus,

View of this Case is, that the Legatee was by the Act of God from making his Claim before

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servo ejus dederit, non dandi implevisse tur. Quin immo ui legatarius complendæ causâ de- ussus erat, decem- rio accepto tulis- videri eum con- uisse quasi, dederit, ait; sed tamen, hæredem stet, quo- eat, posse petere

Eodemque ex o nec per com- m impleri posse conditionem dictum Compensat. num ned. Si tamen testamento inserta at tanquam me- ad finem ulterio- modo alio quam testatorem expressus cumentum accipere

relicta deberi. si fideicommissum relatum, si morte uris fuerit effectus, mancipatione sui s sit, aut patris ratione, non videri conditionem & & rescriptum est: testator tali con- aliud intenderit, psi filio, non autem

patri jure patri potestatis relicta quærantur. In liber- tate quoque legatâ sub con- ditione dandi certam rem etiam rem aliam, aut æsti- mationem ejus, dari posse, jure singulari, favore liber- tatis, a Justiniano consti- tutum est.

The following authorities were also referred to:

Dig. Lib. 32. Tit. 1, lex. 11. § 11.

Si cui ita fuerit fideicom- missum relictum, si morte patris sui juris fuerit effec- tus, et emancipatione sui juris factus sit, non videri deficisse conditionem; sed & cum mors patri contingat, quasi extante conditione ad fideicommissum admittetur.

Cod. Lib. 6. Tit. 25, lex. 3.

Si mater vos sub condi- tione emancipationis hæredes instituit, & priusquam vo- luntati defunctæ parcretur, sententiam deportationis pa- ter meruit, vel aliter de- functus est, morte ejus, vel alio modo patria potestate liberati, jus adeundæ hære- ditatis cum suâ causâ qua- sistis.

Cod. Lib. 6. Tit. 46, lex. fin. 7.

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 ~~~ Victim to the Yellow Fever. No Laches can be im-  
 TULK puted; as there was no Reason for claiming at an earlier  
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Mr. Lovat, for the Defendant, the Executor, merely stated, that he admitted the Plaintiff's Debt; but declined proceeding for it.

Sir Samuel Romilly, and Mr. Johnson, for the Defendant, the residuary Legatee.

The first Objection is one of Form; which makes it impossible to decide the Question in this Cause. This Bill must be dismissed; as being filed by a Person, who has no Interest to sustain the Suit; alledging, that he is a Creditor of a Legatee; and in that Character filing a Bill against the personal Representative of that Legatee, and the residuary Legatee of the original Testator. The Executor is not asked, whether he has Assets independent of this Legacy. The original Bill was filed, not on behalf of all the Creditors, but by this particular Creditor in his individual Capacity, claiming under an Assignment of this Legacy: an Injunction, restraining a Transfer, was obtained; and a supplemental Bill, though not properly such, was afterwards filed in a different Character, as a Creditor suing on behalf of himself and all others. Waiving that Irregularity however, this is open to another Objection, established in *Utterson v. Mair (a)*, *Elmslie v. M'Aulay (b)*, and other Cases, noticed in *Alsager v. Rowley (c)*, that Collusion, or Insolvency, or perhaps gross Negligence of the Executor, must be the Foundation of a Bill by a Creditor against a Per-

(a) 2 Ves. 95. 4 Bro. C. C.  
 270.

(c) 6 Ves. 748. See Bur-  
 roughs v. Elton, 11 Ves. 29.

(b) 3 Broe C. C. 624.

son accountable to the Estate; which special Case must be established by Evidence, and cannot rest upon the mere Admission of the Representative. Your Lordship, citing (a) the Case of *Beckley v. Dorrington*, agrees with the Doctrine, stated by Lord Hardwicke. Here is no Evidence of Collusion: but the Bill states, and the Executor admits at the Bar, merely that he has not thought proper to file a Bill. Is that the special Case required? The Plaintiff has not even proved himself a Creditor; but goes upon the Admission by the Executor of the Debt set up, Twenty-eight Years old. What an Opening to Fraud!

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Upon this Will the Intention is clear to impose on this Legatee, as a Condition precedent, the Necessity of returning to *England* and in Person claiming the Legacy. The Testator uses Words of express Condition. Evidence may be read, though not of Declarations to explain the Will, of Facts, coming to his Knowledge afterwards; and the Fact of his Knowledge, that his Son was living, is established by a Letter, proved as an Exhibit, received from him in *March, 1797*; with Two Postscripts: one in *December, 1796*: the other in *January, 1797*: yet with that Knowledge, that his Son was living, the Testator died without altering his Will. If it could be shewn, that his only Object was to ascertain, that his Son was living, and this was the Mode adopted, certainly upon the Authorities the Legacy would be due: but, as there was the farther Object, that he should return to *England*, and in Person claim this Legacy, that Object not being fulfilled, the Claim cannot be supported. Another Letter from the Son, in 1797, acknowledging the Receipt of the Intelligence of his Father's Death, shews, that he did not intend to comply with the Condition; meaning, that the Legacy

(a) 6 Ves. 749.

should

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should go to his near Relation the residuary Legatee. That Letter speaks of this Passage in the Will; represents the Absurdity of supposing him dead, though he was in constant Correspondence with several Persons, to whom his Father might have applied for Information. At this Period, some Time after the Testator's Death, the Legatee, fully apprised of the Condition, does not choose to claim the Legacy; and indicates no Intention of claiming it: his personal Representative therefore cannot claim it either upon the Ground, that the Condition should be dispensed with, or that the Legatee had Seven Years to make the Claim in. The Answer to such Claim is, that this was a Condition precedent; and nothing but Death in too short a Time to admit of returning to *England* could dispense with it.

Mr. Leach, in Reply.

The Objection of Form, that there is no Privity between the original and supplemental Bills, (though this seems not supplemental, but an original Bill in the Nature of a supplemental Bill), is cured by the Admission of the Executor at the Bar; which is a sufficient Foundation for the Jurisdiction; as, unless Collusion can be shewn, all Persons, who could institute another Suit, would be bound by the Decree in this Suit: the Executor; and all, who could claim under him: all the other Creditors; who, with the Exception of Collusion, can claim only through the Executor. This is the Case of an Executor, who, having no Assets, declines trying this Question at his own Expence; which gives the Creditor the Right to try it: the Executor's so declining, though his Motive may be excuseable, having the Effect of Collusion. The substantial Inquiry is, will the Executor do Justice to the Estate: if not, whatever is the Motive, proper or improper, the Party interested must have the Right to prosecute the Claim.

The

The Testator states upon the Face of his Will his Reason for giving the Legacy in this Way, the Probability, that his Son was not living, and the Ground of that Inference; not having heard from him for a considerable Time. On account of that Uncertainty the Enjoyment of this Legacy by the Niece is suspended for Seven Years, but no longer. In the Cases from the Civil Law, which stand upon this Reason, that before Emancipation the Legacy would be a Gift to the Father, the Question was, whether the Testator set any Value upon the Means, or considered them only as Means of obtaining the End: which was to give the Legacy as soon as the Legatee was capable of enjoying Property: but the Testator looked only to one Mode of requiring that Capacity, the Father's Death, not the Son's Emancipation; and the Reasoning of the English Law is the same in the Case of a Condition to enfeoff, the Party conveying by Lease and Release: the Intention is substantially performed by passing the Estate: yet it may well be supposed, from the different Nature of those Modes of Conveyance, that a Value was set upon the Means. The Consequence stated, that this Legatee shall be presumed to be dead, is conclusive, that the End, not the Means, was the Testator's Object; that he set no Value upon the Means. On that Supposition he would have declared the Legacy forfeited: but to his mere Appearance in the Church no Importance could be attached with reference to the Testator's Object. He might appear there without any Evidence personally to the Executor; and the Condition would be performed: but the Reason of such a Condition must be regarded; that a Possibility may be afforded to the Executor of obtaining clear Proof in this Country, that the Legatee was alive, and the Executor might be satisfied of that Fact by other Means, by Correspondence, for instance, with the Legatee, precluding all Doubt, and making the Medium of Proof pointed out unnecessary. The whole

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Object

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Object of the second Breach of this alternative Condition is to secure satisfactory Means of proving that Fact; which Fact is acknowledged by the Person, who was to take in the Event of the Death of this Legatee, and, being in direct Correspondence with him, could have no Doubt of his Existence.

The Lord CHANCELLOR.

The formal Objections, taken to this Bill, well deserve Consideration: first, that the Suit is instituted upon an original Bill by a Person, stating himself to be the Assignee of this Legacy, and what is called a supplemental Bill by the same Person on behalf of himself and all other Creditors: secondly, a more material Objection, whether a Creditor can claim this Legacy upon the Ground, that it is necessary for the Satisfaction of his Debt; not making that out otherwise than by the parol Declaration of the Executor, not even asserting upon his Oath, that he has not Assets, but asserting that at the Bar. I conceive, that the Individual, who has the Property in her Hands, is entitled to insist, that the Creditor shall prove, that he is such; and the Admission of the Executor is not sufficient: on the contrary there would be a Right to cross-examine that Propf. That however would lead to the Proposition, that the Court would give Liberty to examine: but upon the other Objection of Form it is necessary to examine this Record; and unless it is different from the Representation of the Defendant, I do not see an Answer to the Objection.

These Objections of Form, which are too material to be overlooked, may make it unnecessary to decide, whether this Legacy can be claimed; depending upon a Principle, that requires great Attention. All the Cases from the Civil Law upon my Recollection of them lay down

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that, where the Condition prescribes the Means, the End being obtained, the Means are overlooked; and then, stating the Cases of Emancipation, that have been referred to by Mr. Boteler, they proceed to say, that this is in Favor of Liberty, or may be done upon Legacies *ob piis Causas*; and some of them make a Distinction even as to a Child in this Respect.

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Mr. Boteler said, the Passage as to its being in Favor of Liberty relates merely to the Emancipation of Slaves.

The Lord CHANCELLOR.

I think this Legacy is not due under the Circumstances. The Cases, cited from the Civil Law, are distinguished in this Respect. In those Cases, where the Legacy was considered due, the Means, by which the Party appeared to be living, were not thought to be essential: if the Fact was otherwise established, it was sufficient: but there is in this Will Language plainly shewing, that the Testator did not mean the Legacy to be taken, unless the Fact, that the Party was living, was pointed out by the Means, by which the Testator required that Demonstration.

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The Consequence is, that the Bill must be dismissed without Costs.

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Feb. 5. 8, 9.

Construction
of a Devise in
Fee subject to
and chargeable
with Annuities,
upon the Inten-
tion, collected
from the whole
Will, a benefi-
cial Devise, and
not a Trust re-
sulting to the
Heir as to the
Surplus beyond
the Annuities.

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FRANCES Isaacson by her Will, dated the 29th of March, 1750, beginning with a Direction, that all her just Debts shall be paid or satisfied, made the following Disposition: "I do hereby order and dispose of my Estates in the following Manner: I give, devise, and bequeath all that my Manor or reputed Manor of Fen-ton, &c., and all other my real Estate whatsoever and wheresoever unto my Cousin *Mary Altham*, Wife of *Roger Altham* of Doctors Commons, London, Esq. and to my Cousin *Arabella Isaacson*, and their Heirs and Assigns for ever, subject nevertheless to and chargeable with the Payment of the following Annuities hereinafter mentioned; that is to say, to my Brother *William Isaacson* the Annuity or yearly Sum of £100 given and devised to him by my Father's Will and also a farther Annuity or yearly Sum of £50 which I give him during his Life: to my Sister *Sarah Isaacson* the Annuity or yearly Sum of £60 given and devised to her by my said Father's Will; also a farther Annuity or yearly Sum of £90, which I give her during her Life, for her sole separate and personal Use, exclusive of her Husband, who is to have no Power to receive, &c. the same, &c. And I do order that the Receipts of my said Sister alone whether covert or sole, &c. shall be good and sufficient Discharges for the same;" and after her Decease the Testatrix gave the same Annuity of £150 to her Sister's Son *Henry Creagh Isaacson* for Life, and after his Decease to any other Child or Children of her Sister *Sarah Isaacson* living at the Death of the Testatrix and to the Survivor of such Children during their respective natural Lives, and if but one, then to such only Child

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for his or her Life. The Testatrix gave to her Aunt *Margaret Isaacson* an Annuity of £100 for Life, " and " after her Decease I give to my Brother *Anthony Isaacson* on his Life an Annuity of £150" which after his Decease was to be divided amongst his Children for their Lives; and after giving another Annuity of £20 to her Cousin *Catharine Isaacson* she thus proceeds:

" All which Annuities I will and direct shall be paid quarterly &c. and I do hereby charge my real Estate with the Payment thereof."

The Testatrix gave her personal Estate (with a slight Exception) to *Roger Altham, Edmund Byron, and Giles Alcock*, their Executors and Administrators, " subject to and chargeable with the Payment of my just Debts and the Legacies hereinafter mentioned;" among which were Legacies to her Brothers *Anthony* and *William Isaacson*: to her Cousin *Mary Altham* a Legacy of £100: to her Cousin *Arabella Isaacson* £300, and to *Roger Altham, Edmund Byron, and Giles Alcock* £200 a-piece. The Testatrix then declared, that the Annuity of £150, given to her Brother *William Isaacson* for his Life, should after his Death go to his Children, and after their Deaths One Moiety of it to her Sister *Sarah Isaacson*, and after her Death to her Children, living at the Decease of the Testatrix. The Will then proceeded thus:

" And as to the other Moiety of the same Annuity, together with the surplus Profits of my said real Estate to be computed from the Time of my Decease, I give to my Brother *Anthony Isaacson* for his Life and after his Death to such of his Children as shall be living at the Time of my Death and to the Survivors and Survivor of them during their respective natural Lives; and my farther Will is, that after the several Decesses of my

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" said Sister and her Children the said annual Sum of
 " £150 and the £75 as aforesaid given to her, and them,
 " shall go to my said Brother *Anthony* for Life, if he
 " shall be then living, and if he be dead, then to such of
 " his Children and the Survivor and Survivors of them
 " that shall be living at my Death; and in case of his and
 " their Deaths first happening then my Will is that the
 " whole Rents and Profits of my said real Estate shall go
 " and be paid to my said Sister *Sarah Isaacson* during her
 " Life, if she shall be then living, and if she shall be dead,
 " then to be paid to such of the surviving Child or Chil-
 " dren of my said Brother and Sister that shall be living
 " at the Time of my Decease for his, her, or their natural
 " Life or Lives only." The Testatrix appointed *Roger Altham, Edmund Byran, and Giles Alcock*, Executors.

By a Codicil, dated the 12th of April, 1752, the Testatrix gave a few Legacies; declaring, that she did thereby charge and subject her real and personal Estate with the Payment thereof; adding, "but it is my Desire that my personal Estate shall be first applied in ease and Exoneration thereof and of the other pecuniary Legacies in my Will mentioned wherewith I have charged my personal Estate with the Payment in Manner therein expressed."

The Testatrix died in 1752, leaving *Anthony Isaacson*, her eldest Brother, and Heir at Law, surviving. All the Persons, to whom Annuities were given, being dead, the Heirs at Law of the Testatrix claimed her real Estates on the Ground, that they were devised to *Mary Altham* and *Arabella Isaacson* for particular Trusts only; which being satisfied, the Heir was entitled by way of resulting Trust. For the Purpose of trying this Question an Ejectment was brought by the Devisees against the Heirs, and a Verdict was given for the Devisees, sub-
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ject to the Opinion of the Court of King's Bench. The Case was argued on the 13th of November, 1812; when the unanimous Judgment of the Court was, that the Devisees were entitled to recover, and the Verdict ought to stand.

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The Bill was then filed by the Heirs at Law; praying a Declaration, that they were entitled to the whole beneficial Interest in the Estate devised to the Defendant *Arabella Denison*, formerly *Isaacson*, and *Mary Altham*; a Conveyance of the legal Estate, and an Injunction.

The Defendant *Arabella Denison* by her Answer stated, that she was at the Time of the Decease of the Testatrix an Infant of the Age of Seventeen Years. The other Defendants demurred to the Bill for Want of Equity. Upon this Demurrer and a Motion for an Injunction, the Cause came on.

Sir Samuel Romilly, Mr. Hargrave, and Mr. Benyon, for the Plaintiffs, the Heirs at Law.

In order to constitute a Devisee a Trustee, it is not indispensably necessary, that the Words "in Trust" should be employed: if the Intention appears, that the Devisee shall be a Trustee, that is sufficient according to the Doctrine of Lord Hardwicke in the important Case of *Hill v. The Bishop of London* (*4*); and that Intention is manifest upon the whole Frame of this Will. The Terms "subject to and chargeable with" are synonymous with "in Trust." Upon what Principle can it be inferred, that a beneficial Interest was intended to be given to these De-

(a) 1 Atk. 618.

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visees?

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visees? There was no Possibility, that they could derive any Advantage from it for a great Number of Years: probably they would not survive the Trust expressly created; and whose Descendants would be entitled depended on Accident since, whether the Devisees took in Trust or beneficially, they were Joint-tenants. It is not immaterial, that the Purposes, for which they were appointed, necessarily required, that they should have the legal Estate vested in them. The Testatrix, having the same Intention with respect to her personal, and her real, Estate, gave Legacies to these Devisees: could she then mean to give them the beneficial Interest in her real Estate? No Passage of the Will indicates that Intention; and the clear Principle of Law is, that an Heir shall not be disinherited without express Words or necessary Implication (*a*). If this Case had arisen upon a Deed, for Instance a Feoffment, without Consideration, to *A.* and his Heirs, to the Use of *B.* for Life, with Remainder to the Use of *C.* in Tail, the Deed stopping short with that Limitation, there would be a resulting Use for the Heir, carrying the legal Fee (*b*). A Will however, importing Bounty, the Presumption is, that a beneficial Interest was intended: the Heir is therefore required to shew, that, though not in Words, yet in Effect, this is a Trust: substantially a Devise in Fee in Trust for particular Purposes, not exhausting the whole beneficial Interest. The Devise is followed by several Annuities, which are so many Provisions for Life, for her Brothers and Sister; indicating at least no Hostility towards them. In the Bequest of the personal Estate, where the same Terms are used as in the disposing of the real Estate, "subject to and chargeable with," did she intend to make the Executors, having equal Legacies,

(*a*) See *Boutell v. Mohun*, *got v. Penrice*, *ibid.* 471: *Prec. Ch.* 381. *Sympson v. Hornsby*, *ibid.* 439; and *Pig-* (*b*) *Co. Lit.* 23, *a.* 271, *b.*

Trustees for the next of Kin? If that must be the Construction, why should not the same Language, applied to the real Estates, accompanied too, by Legacies to the Devisees, have the same Effect, creating a resulting Trust for the Heir at Law? The Devise of the "surplus Profits" of the real Estate to her Brother and Heir at Law shews, that the Testatrix, giving her real Estate to her Two Cousins, charged with the Annuities, had a farther Purpose. This, if not a legal Estate, is at least another express Trust. The Devise, indeed, is so surrounded, so implicated and blended with Trusts, that the direct Use of that Term could not more strongly mark the Character of the Devisees. By such a Series of Trusts the subsequent Interest, whoever has it, is postponed to a very remote Period. The Conclusion upon the whole is, that she never meant to give the Residue to the Devisees; that making a partial Disposition she had no farther Object; and the Consequence of Law is, that the Residue of the beneficial Estate not exhausted results to the Heir.

The Doctrine, that where there is a Devise upon Trust for particular Purposes, which do not exhaust the whole beneficial Interest, the Surplus shall be a resulting Trust for the Heir at Law, is to be found in numerous Cases: *Hill v. The Bishop of London* (a), *Hill v. Cocks* (b), *Stansfield v. Habergham* (c), *Lloyd v. Spillet* (d), *Davidson v. Foley* (e), *Packington v. Wych* (f), and the

(a) 1 *Atk.* 618.

(b) *Aute*, page 173.

(c) 10 *Ves.* 275. 280.

(d) 2 *Atk.* 280.

(e) 2 *Bro. C. C.* 203.

(f) Cited by Mr. Har-

grave from C. B. Ward's MS.

The Case afterwards went to the House of Lords. See *Wych*, Appell. and *Packington*, Respond. 1 *Bro. P. C.* 372.

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Cases collected in Mr. Sanders's Notes (*a*) to *Hill v. The Bishop of London*. In *Packington v. Wyck* a Term was created for Fourteen Years to pay Debts; and the Surplus was held a resulting Trust for the Heir. In a doubtful Case the Decision ought to be in Favor of the Heir; whose Right the Law favors. When a Person is once appointed Trustee, expressly or by Implication, there must be the most unequivocal Declaration to make him take beneficially. In *Harton v. Harton* (*b*) a Devise to Trustees and their Heirs upon Trust to permit a *Feme Covert* to receive the Rents during her Life for her sole and separate Use, with Remainders to her first and other Sons, &c. vested the legal Estate in the Trustees. The Plaintiff's Construction, that this is a Trust to a certain Extent only, all beyond that resulting to the Heir, renders the Will simple and consistent. The Terms, "Surplus,

(*a*) The Cases collected by Mr. Sanders as Instances of the general Rule, are, *Randall v. Bookey*, 2 Vern. 425. Prec. Ch. 162. S. C.—*City of London v. Garway*, 2 Vern. 571.—*Hobart v. Suffolk*, 2 Vern. 644.—*Bristol v. Hungerford*, 2 Vern. 645.—*Starkey v. Brooks*, 1 P. Wms. 390.—*Cruse v. Barley*, 3 P. Wms. 20.—*Stonehouse v. Ectlyn*, 3 P. Wms. 252.—*Digby v. Legard*, 3 Cox's P. Wm. 22.—*Gravenor v. Hallum*, Amb. 643.—*Arnold v. Chapman*, 1 Ves. 108.—*Ackroyd v. Smithson*, 1 Bro. Ch. Ca. 503.—*Leslie v. Devonshire*, 2 Bro. Ch. Ca. 188.—*Robinson v. Taylor*, *ibid.* 589.—*Hutcheson v. Hammond*, 3

Bro. Ch. Rep. 128.—*Spink v. Lewis*, 3 *Bro. Ch. Rep.* 355.—*Sherrard v. Lord Harborough*, *Amb.* 165.—*Robin son v. Taylor*, 1 *Ves. jun.* 44. As Instances of the Exceptions, Mr. Sanders cite—*Canningham v. Mellish*, *Pre Ch.* 31.—*Rogers & Roger*, *P. Wms.* 193.—*Mallabar*, *Mallabar*, Cas. temp. *Talbot* 1, 78.—*Durour v. Molleson*, 1 *Ves.* 320.—*Cook v. Duckfield*, 2 *Atk.* 562.—*Wright v. Row*, 1 *Bra. C. C.* 61.—*Popham v. Lady Aylesbury*, *Amb.* 68.—See *Wright v. Wright*, 16 *Ves.* 188, and the References in the Note (*ee*), 190, to other late Cases.

(*b*) 7 T. R. 652.

"Profits,"

s," cannot mean the Estate itself. Who then was
is, to pay the Taxes, and the Annuities, but the
s, as Trustees? The Observation has been fre-
made, that there is no Magic in Words, when the
a is clear. The Word "Cousin," by which she
ates the Two Devisees, cannot be considered
, since she uses the Terms "Brother," "Sister,"
other Term of Relationship, when she speaks of
nuitants, and most of the Legatees,

*Leach, Mr. Bell, and Mr. Dowdeswell, for the
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tting, that under a Devise for particular Purposes
urt will presume, that those Purposes limit the
and, when they are satisfied, the Heir shall take,
s is liable to Exception, if a contrary Intention is
lected from the whole Will. Thus, if the Testa-
expressed a particular Affection for the Devisee,
ral Rule has not prevailed against the Inference
fit to the Devisee: but it is contended, that where
, as in this Case, from the generality of the
a partial Exception in the Shape of an equitable
that Inference of Benefit, intended by the general
is not to be collected. Can it be maintained, that
e to A. in Trust to sell to pay Debts is the same
ise to A. subject to and chargeable with Debts?
position goes to that Extent. The Effect of Le-
> Executors, making them Trustees for the next of
Analogy to which this Construction is supported, is
sequence of Law, not the Result of Intention, but
y counteracting it. That Rule, however, cannot apply,
here is an express Gift of the Surplus to them; and
priety of the Rule, and the Reason, upon which it
ed, that a Man cannot take both a Part and the
have been much questioned; and Circumstances
much

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much slighter than those of this Case have prevailed against it. *Harton v. Harton* was a Devise expressly upon Trust; and the Trust, if it had not been for a *Feme Covert*, would have been a Use executed by the Statute. The Terms of this Devise, "subject to and chargeable with" these Annuities, import a legal Rent-charge; and the Inference of Trust from the Situation of One of several Annuitants, being a married Woman, is repelled by the independent Character of the others. The Objection from the Remoteness of the Period, at which the Benefit of this Devise is to come into Possession, is removed by the Fact, that all the Lives, during which it was suspended, were in Existence at the Decease of the Testatrix; and therefore, according to the usual Expression, all the Candles were burning at the same Time. If, however, she contemplated an Interest beyond the Lives of those Persons, why could she not devise it, rather than permit it to descend to her Heir? The Joint-tenancy is accounted for by the Remoteness of the Benefit, which was to fall to the Survivor, according to the Event. The Inference of Benefit intended arises fairly from the Use of the Word "Cousin," indicating Affection, and an Intention of Benefit beyond the particular Purposes: a Reason, which prevailed in *Coningham v. Mellish* (a), and *Rogers v. Rogers* (b); and in *Hobart v. The Countess of Suffolk* (c) the same Effect was prevented by the Circumstance, that One only of the Devisees was a Cousin. A material Distinction of this Case is, that it is a Devise of the entire Estate, and the Annuities are only partial Exceptions; and though in Deeds the Want of Consideration has been held to create a resulting Use for the Grantor, upon Wills a different Construction prevails: a Devise, being *prima facie* a Bounty, requires no Con-

(a) Prec. Ch. 31.

temp. Talbot, 268. S.C.

(b) 3 P. Wms. 193. Ca.

(c) 2 Vern. 644.

sideration.

tion. The Infancy of the Devisees, not only at the time of making the Will, but at the Death of the Testator, though considered unimportant, is a strong Indication that the Testatrix meant to give them the beneficial interest; not to make them Trustees; corresponding with the general Doctrine of this Court: *Taylor v. Taylor* (*a*), *Wma v. Mumma* (*b*), *Lamplleigh v. Lamplleigh* (*c*), *Blinkhorn v. Feast* (*d*). This Question has been decided upon the Merits by a Court of competent jurisdiction, no express Trust "to receive and pay," "to admit or suffer," &c. Terms, which in most Cases vest the legal Estate: nor is it "to repair," or "pay Taxes," in *Shapland v. Smith* (*e*). There is nothing which requires the Interposition of Trustees; and the Heir is fully disinherited by Words importing Bounty. In

v. The Bishop of London Lord Hardwicke (*f*), that each Case must depend upon its peculiar circumstances; an Opinion, in which the Master of Rolls coincides in *Walton v. Walton* (*f*), observing that it is not universally true, that the Expression of Purpose, for which even a Devise of Land is made, is the Devise to the Purpose, so expressed. The Case of *North v. Crompton* (*g*) bears a striking Resemblance to this: the Heir in each Case taking an Interest in the Devisees having nothing, unless the Devise was beneficial. *Philips v. Hele* (*h*), *Docksey v. Docksey* (*i*), *nett v. Lord Beauclerk* (*k*), and *Jackson v. Hunsdon* (*l*). As to the abrupt Manner, in which the Testa-

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) 1 Atk. 386.

(f) 14 Ves. 318. See 322.

) 2 Vern. 19; and see
Raithby's Note.(g) 1 Ch. Ca. 196. See
2 Vern. 253.) 1 P. Wms. 112; and
Mr. Cox's Note.

(h) 1 Rep. Ch. 190.

) 2 Ves. 27. See 30.

(i) 3 Bro. P. C. 39.

) 1 Bro. C. C. 75.

(k) 3 Bos. & Pull. 175.

(l) 6 Amb. 487.

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trix stops after the several Annuities for Life, it was unnecessary, after having devised the Fee, to repeat it.

Sir Samuel Romilly, in Reply.

The Authority of *North v. Crompton* has been impeached by many subsequent Decisions; and no Doubt remains at this Day, that a Legacy to the Heir at Law or the next of Kin, will not preclude their Claim of the Surplus undisposed of. *Randall v. Bookey* (a) is a direct Authority against *North v. Crompton*, and in Favor of the resulting Trust. The only Question here is, whether, a Trust being evidently intended upon the whole Will, an express Declaration of Trust is indispensable. In *Hill v. The Bishop of London*, which states distinctly the Rules, that must govern this Case, the Exordium indicates an Intention to dispose of every Thing: the Testator's Mother-in-Law was the great Object of his Bounty; and it is not easy to account for Lord Hardwick's Doubt upon the Construction, which he finally adopted. Here is an express Declaration, that the Receipt of a married Woman shall be a Discharge: to whom but the Devisees as Trustees? A Decision in Favor of the Devisees must suppose, that the Testatrix intended to give a partial Interest to her Brother and Sister, her nearest Relations, and that afterwards the whole Estate should go to Strangers, or very distant Relations, then unborn. Can any Disposition be imagined more improbable or capricious than such a Preference of the Descendants of her Cousins to the Exclusion of the Descendants of her own Brothers and Sister? The Case of *Coningham v. Mellish* did not turn upon the Word "Cousin," on The Devisee was as near of Kin as the Heir to the Testator; and was appointed Executor; but, as the De-

(a) 2 Vern. 425. Prec. Ch. 162. S. C.

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exhausted the personal Property, he would have taken nothing, either as Executor, or Devisee, if the Surplus of the Land had been held a resulting Trust for the Heir. The Case of *Rogers v. Rogers*, which is better reported in *Forester (a)*, though the Devisee was described as his dearly beloved Wife, proceeded upon the Declaration, that she was "sole Heiress and Executrix of all his Lands" "and real and personal Estate to sell and dispose thereof" "at her Pleasure." The Objections from the Infancy of one of these Devisees, and the Coverture of the other, the Improbability, that such Persons were intended to be mere Trustees, is answered by the Distance, to which the Trusts were likely to extend, and the Circumstance, that the married Woman was the Wife of a professional Man, competent to advise her in the Discharge of her Duty, as a Trustee. The Case of *Mumma v. Mumma* is not satisfactory. If Infants can be Trustees for Payment of Debts, why not for other Purposes? In *Blinkhorn v. Feast (b)* Lord Hardwicke relied upon Infancy only as one of several Circumstances. The Rule, that an Executor, having a Legacy, is a Trustee of the Surplus for the next of Kin, depends, not upon a legal Inference, but on the presumed Intention: the Law giving the Surplus to the Executor.

If the Devise of an Estate charged with Debts will carry the whole Fee, subject to the Charge, the Question is, under all the Circumstances, whether, this being a Devise of the whole Fee upon certain Trusts, which do not exhaust the whole beneficial Interest, the Heir is not entitled to that, which remains, as a resulting Trust.

The Lord CHANCELLOR.

The Decision of the Court of King's Bench I consider

(a) *For.* 268.

(b) *2 Ves.* 27.

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as having determined this, and this only; that the Testatrix does not give to her Heir at Law, or leave in him, after all the particular Estates determined, a legal Estate, upon which an Ejectment could be maintained; and the Court, if they entered into the Consideration, whether the Two first Devisees did, or did not, take the beneficial Interest, as well as the legal Estate of Inheritance, subject to the particular Estates, either legal or equitable, given to other Persons, could not take that View of it, except to enable them to determine, whether the Testatrix intended to sever the legal and beneficial Interests; with the View to determine farther, whether the legal Interest was, or was not, in the Devisees. Their Opinion, I believe, was, that both the legal and equitable Interests were in the Devisees; and that is to be estimated as an Opinion, expressed only with a View to the Determination of another Question.

Distinction
between a De-
vise, charged
with Debts,
and on Trust
to pay Debts.
The former a
beneficial De-
vise, subject to
the particular
Purpose: the
latter limited
to the parti-
cular Purpose;
and therefore
the Interest not exhausted a resulting Trust for the Heir.

The Principles, applicable to this Case, are very well settled. I adopt those, expressed in *Hill v. The Bishop of London* (a), as affording the Grounds, upon which Lord Hardwicke proceeded: but I will here point out the nicety of Distinction, as it appears to me, upon which this Court has gone. If I give to A. and his Heirs all my real Estate, charged with my Debts, that is a Devise to him for a particular Purpose, but not for that Purpose only. If the Devise is upon Trust to pay my Debts, that is a Devise for a particular Purpose, and nothing more; and the Effect of those Two Modes admits just this Difference. The former is a Devise of an Estate of Inheritance for the Purpose of giving the Devisee the beneficial Interest, subject to a particular Purpose: the latter is a Devise for a particular Purpose; with

(a) 1 Atk. 618.

no

ition to give him any beneficial Interest. Where
e the whole legal Interest is given for the Purpose
fying Trusts expressed, and those Trusts do not

Execution exhaust the whole, so much of the
al Interest as is not exhausted belongs to the
but, where the whole legal Interest is given for a
ar Purpose, with an Intention to give to the De-
the legal Estate the beneficial Interest, if the
is not exhausted by that particular Purpose, the
goes to the Devisee; as it is intended to be given

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is the Meaning of the several Passages in *Hill v. Trust by Im-*
shop of London (a), and other Cases, before Lord plication with-
icke; who marks the Distinction, that the Word out the Word
, " was not made Use of. That is a Circumstance, "Trust."

tended to; but nothing more; and, if the whole
of the Will creates a Trust, for the particular
e of satisfying which the Estate is devised, the
the same, though the Word "Trust" is not used:
n the whole Will must create a Trust, for the
ar Purpose of satisfying which the Estate is de-

itting these Principles to be, as they are demon-
to be by all subsequent Authorities, the Question
t is to be the Determination upon this particular
taking into Consideration the whole of its Contents?
e Lands devised for the mere Purpose of dis-
g particular Trusts: or is an Intention expressed,
: beneficial Interest should be taken with reference
Part of the legal Estate, not given upon particular

(a) 1 Atk. 618.

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This

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Devide after a
Direction, that
all the Debts
shall be paid,
amounts to a
Charge.

This Will, made Sixty-three Years ago, begins with Direction, that all the Testatrix's just Debts shall be paid or satisfied: that is, in other Words, exactly the same as if she had given all her real Estate subject to a chargeable with her Debts; and the Meaning of the would be, not to devise for the Purpose of paying the Debts, but to give the Estate with a Charge upon it the Amount of the Debts. I do not say, there may not be context in a Will, that would give another Construction to the Words "subject and chargeable"; and the Question is, whether those Words in a subsequent Passage have the ordinary Meaning; or whether upon the whole Context the Court is forced to say, they are not used in their ordinary Sense, but that the Estate was given for the particular Purpose of enabling the Person, taking the legal Estate, to make those Payments?

The Testatrix, having thus charged her Debts, and only her Debts, by Implication upon the Person, taking the real Estate, disposes of her personal Estate in the following Manner. I collect from the Will, that she had a Brother, *William*: another Brother *Anthony*, her Heir at Law, a Sister *Sarah*, and an Aunt, to whom she gives an Annuity; and I point this out to shew, what was the State of her Family at the Time of making her Will: they were the principal Objects of her Bounty, independent of the Devisees of her real Estate. The Circumstance, that she gives the Character of Cousin to the Devisees, is only one Circumstance, from which an Inference is to be drawn, more or less, as to the Intention, according to the other Context; and, as in the Case of *Coningham v. Mellish* (a) that was held a Circumstance to be attended to, with reference to this also, that the Heir at Law was in the same Degree of Relation, so

(a) Pre. Ch. 31.

here

here there is not one Person, to whom the Testatrix gives any Thing, not a single Legatee, whose Relation to her she does not describe; and this Word "Cousin" is applied in a Will, in which other Persons, standing in a nearer Degree of Relation to the Testatrix, viz. Brothers and a Sister, are mentioned.

The Intention certainly appears singular to give the Character of Trustee, and that merely, to Two young Ladies; the one a married Woman, the other an Infant, of the Age of Fifteen or Seventeen Years: Two Persons, under Circumstances so little adapted to such an Office: but with reference to that what was intimated by Mr. Hargrave must be taken into Consideration; that, if there is any Trust in this Will, the Testatrix has made them Trustees; and upon the Passage, cited from Lord Hardwicke's Judgment (*a*), the same Observation had occurred to me; that though the Appointment of an Infant as Trustee is very singular, it was actually made: The Observation therefore, applied to this Part of the Will, does not deny, that these Circumstances are to be attended to: but, if upon the whole Context these Persons are Trustees, I am not to say, they cannot be so, on the Ground, that one is a married Woman, and the other an Infant. Another singular Circumstance is, that one of them is the Wife of one of the Executors; and the Testatrix has vested the Trust of the personal Estate, not in her, or the Infant, but in Three Gentlemen particularly named. Her Preference of these Persons, giving to her Brothers, her Sister, and their Children, including her Heir, through a double Generation these Interests expressly for Life, all these Singularities are answered by the Fact, that she has made this Disposition.

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(*a*) 2 Ves. 30.

T 2

Stopping

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Distinction
between a di-
rect Trust and
a Charge;
though en-
forced in Equi-
ty much in the
same Way.

Stopping at this Part of the Will, where the Testatrix has devised all her real Estates whatsoever to these Two Persons and their Heirs, subject to and chargeable with the Annuities after mentioned, it is impossible to say, this is within those Cases, laying down the Principles I have stated, a Devise for the particular Purpose of paying the Annuities. It is a Devise in Law for the Purpose of giving the Estate; but with an ulterior Purpose, that the Devisees should take subject to the Annuities; and in a Sense it would have been a Gift upon a Trust. There is a great Difference here between a Devise upon Trust and a Devise subject to a Charge: but the Object is effected much in the same Way; compelling the Party to make good the Charge, or Trust, by very similar Operations, as applied in this Court.

The Question, how far these Annuities, as they are created legal Annuities, are equitable, or any of them, must be determined upon the same Principle as applied to all, except one, given to the separate Use of a married Woman: but, suppose the Expression to be, "subject to the Annuities after mentioned, in which I mean, "that none of the Annuitants shall have a legal Interest:" or, "that all should have a legal Interest, except one; and that one shall have an equitable Interest." That surely would not create a Trust within those Decisions, that an Estate, given so subject and chargeable, is to be considered, as given for a particular Purpose: but it would be for the Purpose of giving the Estate subject to Annuities; of which, if legal, Payment is to be enforced in one Way; and, if equitable, in another.

With regard to the Annuity for the separate Use of the married Woman, it is not necessary to determine the Effect of the Case (*a*) before Lord Kenyon, considering

(*a*) *Harton v. Harton*, 7 Term Rep. 652.

the

the legal Estate, the whole legal Fee, as being in the Trustees, and no Estate in the first and other Sons; and not as it was to support merely the first Devise to the separate Use of the married Woman first mentioned, but as there were other Devises to the separate Use of others in subsequent Limitations, where there was no Devise of the Estate itself: my Opinion with reference to that being, that, if I am right, I am right taking it as an equitable Annuity; and, if wrong, I am wrong, whether it is an equitable Annuity, or not.

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If this is so as to the real Estate, the Argument is, I admit, extremely fair as to the personal. The Testatrix, giving a great Variety of Legacies, always mentions the Relation of the Legatee, and, among others, having given to these Three Gentlemen her personal Estate subject to the Legacies, she gives to each of them £200. It is said, that, being Trustees of the personal Estate given to them subject to and chargeable with the Legacies, they ought to be considered as Trustees of the real Estate; and the Words "subject and chargeable," in the former Part of the Will, are to be construed by the same Exposition as in the subsequent Passage, where those Words are used. It was contended on the other Hand, that they are not Trustees of the personal Estate; and there is in the several Cases a strong Doubt upon it.

The Ground, upon which an Executor, with a Legacy, or Executors having equal Legacies, are Trustees of the Residue, is, that you shall not intend, that a Person, having a Part given to him, is to take the Whole (*a*).

(a) See the last Case on *Sanford*, 17 *Ves.* 435, and that Subject, *Langham v. the References.*

posed of; as, having Part given, they cannot be intended to take the Whole.

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That is the settled Law; and it would be vain and improper now to question the Propriety of such a Determination: but the Principle, upon which this Doctrine has been introduced, that an Executor having a Legacy, is a Trustee, has given so little Satisfaction, that Case upon Case has occurred, paring down the Application of that Doctrine; until it is not easy to say, upon what Foundation it stands; and this is as good a Reason against the Argument from equal Legacies, that they shall be Trustees, as most of the Reasons on the other Side, that the Object might be to give them a Right to come in with the others; to insure them something in case of a Deficiency to answer all.

The Court however has not said so; and I will consider this Case upon the Assumption, that these Persons were Trustees of the Residue of the personal Estate: But does it follow, that the Words "subject and chargeable to," are to have the same Construction in both Parts of the Will? That is not a Consequence. I cannot infer from the Construction, which the Testatrix, giving these Legacies, has put upon those Words, so much as to deny them as to the real Estate their ordinary Construction, if there are no Expressions applying to the Devise of the real Estate, equivalent in their Effect to pare down the ordinary Meaning of those Words; and the Construction must be the same, as if she had said expressly, that the personal Estate was to be subject to and chargeable with the Legacies; that she did not mean her Executors to take; but that as to the personal Estate they were to be Trustees; making no such Declaration as to the real Estate.

Presumption
against intend-
ing an Infant to
be a Trustee.

No resulting Trust for an Heir, taking a Benefit by the Will; but subject to Circumstances.

Taking Notice of that Class of Cases, that it is difficult to consider an Infant as intended to be a Trustee, and another Class, that an Heir, taking a Benefit by the Will,

cannot

cannot have a resulting Trust, I agree, all these Cases depend on their particular Circumstances; which are to be attended to; but not to have too much Weight. The Ground of my Judgment is this: If this is a Devise for a particular Purpose only, and the Application does not exhaust the Whole, there is a Trust for the Heir, and whether the Testatrix has said so, or not: the Heir standing in this Situation; that he is entitled to what is not in Law or equity given to another. On the other Hand, this being a Devise of the real Estate, subject to and chargeable with the Annuities, and the Interest for Life in the Rents and Profits in *Anthony* and *Sarah Isaacson* and their Child and Children, and taking it to be a Devise, not for those particular Purposes only, but of the beneficial Interest, subject to a Devise, legal or equitable, with reference to those Annuities, this is not a Case of resulting Trust for the Heir; and upon the whole the Testatrix did not mean to give these Estates for those Purposes only; but did mean to give them, deducting all the Value of the Annuities, expressly given, and the surplus Rents and Profits for the Life or Lives, for which they are given.

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Having looked very attentively at the Will, and at all the Cases; and, being satisfied, that no farther Consideration will enable me so to assist my own Mind as to produce a Change of the Opinion I have formed, I think it better not to delay the Judgment of this Case.

The Motion was refused; and the Demurrer allowed.

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Feb. 5, 6. 8. 12.

DE TASTET, CARROLL, and ROBARTS, Ex
parte (a).

No Jurisdiction in Bankruptcy to reject a Debt on the Ground, that it must command the Choice of Assignees, and the Creditor has an adverse Interest to the general Creditors by Property and Security obtained from the Bankrupt immediately before the Bankruptcy: but an unjust Use of

his legal Right by choosing himself will be controlled by the Lord Chancellor either by removing him, if the Election is recent, and nothing done under it, or otherwise by some Arrangement, as in this Instance, from the great Amount of the Debt, appointing another Assignee to act solely in the Investigation and Decision of the disputed Claim.

Application to the Lord Chancellor in Bankruptcy before the Decision of the Commissioners to receive or reject Proof of a Debt, with the View to the Choice of Assignees, improper.

Distinction as to Securities held by a Creditor, seeking to prove in Bankruptcy between Bills and Property of uncertain Value: the former, being ascertained on the Face of them, taken at the full Amount, and deducted.

De

JOSEPH Parry having absconded under a Charge of Forgery, a Commission of Bankruptcy issued against him and *Thomas Davenport Latham*, his Partner in the Business of Wine and Spirit Merchants; who had also committed an Act of Bankruptcy; but was in no Degree implicated in the Charge of Forgery.

At the first public Meeting under the Commission the Petitioner *Firmin De Tastet* offered to prove a very large Debt upon Three distinct Accounts: the Two first upon Discounts; each to the Amount of above £3000; and the third, exceeding £80,000, upon a general Balance of Accounts. This Proof was resisted by the petitioning Creditor on the Ground, that between *Thursday* the 14th of *January*, when the Forgeries were discovered, and *Sunday* the 17th, when *Parry* absconded,

(a) 1 Rose's Bank. Cases, 324.

De Tastet had obtained from him in Bills and Goods Property to the Amount of £60,000; which *De Tastet* claimed to hold as his own, or as a Security; giving Credit accordingly in the Account, the Balance of which he proposed to prove.

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De Tastet, being examined before the Commissioners, admitted, that after the Acknowledgment of the Forgery in his Presence by *Parry* on *Thursday* the 14th of *January* the Bills were drawn and indorsed, and 1576 Puncheons of Rum and other Property transferred; insisting, that the Rum, &c., was agreed to be given up to him as his Property, as already belonging to him, and bought and paid for with his Money.

The Examination of the Petitioner *De Tastet* not being closed, and a farther Investigation of his Debt by the Examination of other Persons being proposed, the Commissioners could not at that Meeting come to a Determination either to admit or reject the Debt; conceiving also, that the usual Caution in admitting a considerable Debt at the first Meeting was the more proper under the peculiar Circumstances, excluding all Means of Information as to what passed between the Creditor and the Bankrupt, and led to such large Transfers of Property immediately before the Bankruptcy, and under an absolute Necessity of absconding.

On the Day previous to the second Meeting *De Tastet* by an Application to the *Lord Chancellor* without Notice, suggesting merely, that he was prevented from proving his Debt, and offering to deduct the Value of the disputed Property, to be ascertained by the Commissioners, and to prove the Residue, obtained an Order for that Purpose on the Terms of giving Security for the Property retained,

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De Tastet,
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retained, if the Commissioners should determine, that he was not entitled to retain it, and he should not reverse their Decision. The next Morning, before the Meeting took place, a Petition to discharge that Order was brought on.

Mr. Leach, and Mr. Montague, in support of the Petition to discharge that Order, contended, that it was made upon an unfounded Suggestion, that the Debt was rejected, and upon an Application *Ex parte*, without Notice, and was contrary to all Authority; as, this Creditor under the Circumstances, disclosed by the Petition, having obtained Property from the Bankrupt with Knowledge of the Forgery, must be held strictly to the general Rule, that a Creditor, before he is permitted to prove, must give up his Security: if therefore he had availed himself of this Order to choose himself Assignee, he would of course have been immediately removed; having an Interest against the other Creditors inconsistent with the Duties that Office would impose upon him.

Sir Samuel Romilly, Mr. Bell, and Mr. Shadwell, for De Tastet.

This is regular. There was no Person, on whom Notice could be served: no Debts having been proved; not even the petitioning Creditor's Debt. The Property, delivered to *De Tastet*, was his own; subject only to the Objection under the Statute of James (*a*), as having been in the Bankrupt's Possession. *De Tastet* desires to prove a Debt not disputed; offering the most unobjectionable Security, or even to deposit the Goods to await the Event. He proposes to prove, not his whole Debt, but the least Sum, to which he can possibly be entitled.

(*a*) Stat. 21 Jam. I. c. 19. s. 10, 11.

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The Question is not, whether *De Tastet* shall himself be the Assignee, but whether he, upon whom, as having from the Amount of his Debt the greatest Interest, the Statute has thrown the Protection of the Estate by the Choice of Assignees, shall vote in that Choice. It is supposed, that he means to choose himself: but it is not to be assumed, that he will exercise unjustly the Power, vested in him by the Law. The late Case of *Ogilvie* (*a*) shews, that Persons may prove, though they have an Interest adverse in some Degree to that of the general Creditors.

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and
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Ex parte.

Mr. Leach, in Reply.

The Discharge of this Order cannot affect any Right of *De Tastet*, except that of voting in the Choice of Assignees; which under the peculiar Circumstances of this Case, claiming adversely to the other Creditors no less a Sum than £60,000, he cannot exercise with Safety to their Interests. In the Case of *Ogilvie* the Assignees were not removed: but another was appointed to act between them and the general Body of the Creditors upon this special Ground, that the original Assignees, having acted for Two Years, had acquired a Knowledge of the Affairs of the Bankruptcy, that made it beneficial to the Creditors, that they should be continued.

The Lord CHANCELLOR.

The Order I made Yesterday was certainly without Precedent; and I must do Justice to the Officer (*b*), who

(*a*) In the Bankruptcy of *Ross and Ogilvie.*

(*b*) The Register was in Court: not the Secretary of Bankrupts.

sat

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sat below me, by stating, that he suggested, that Notice ought to be given. I then thought, and still think, otherwise: but the Judgment of the Commissioners as to receiving or rejecting the Proof, either wholly or partially, should be first taken; and a Creditor has no Right to come here for a previous Direction to them. They ought to exercise their own Judgment; which, if wrong, may be rectified by an Application here. It is true, an Assignee will be removed, or the Inconvenience resulting from the Choice corrected, under given Circumstances: but I repeat, that it is a great Evil to apply before the Choice of Assignees for a Direction to the Commissioners, as to what Debts they should receive or reject; and, therefore, this Order must be discharged.

Let *De Tastet* go before the Commissioners, and offer such Proof, and upon such Terms, as he may be advised, and let the Choice of Assignees be postponed to Wednesday, with Liberty to both Parties to make any Application in the mean Time.

Under this Order *De Tastet* again tendered the Proof, proposing to give Security for the disputed Property, or even to deposit it subject to his Claim; but refusing to deliver it up absolutely.

The Proof being rejected was brought before the *Lord Chancellor* by a Petition, complaining of that Decision, &c. and praying an Order, that the Proof shall be admitted.

Feb. 8.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Shadwell*, in support of the Petition.

The Commissioners adopted a similar Course in the Case of *Amhurst*; and Assignees having been chosen, your Lordship set aside the Choice. If, as it is alledged, this is the Practice of Commissioners, it requires Correction. This Proof was rejected, not upon any Doubt as to the Debt, but on the Presumption, that the Petitioner, if permitted to prove, and vote in the Choice of Assignees, would certainly choose himself sole Assignee; and then there would be no Means left of agitating the Question as to his Right to retain the specific Property in dispute. If by Law he is entitled to be Assignee, your Lordship cannot deprive him of that Right; though you will prevent any abuse of his Power.

Mr. Leach, and Mr. Montague, for the petitioning editor.

The Commissioners not only acted right in rejecting the Proof, but they had no Power to receive it. The Rule, established by invariable Practice, is, that a Creditor holding a Security is not permitted to prove, until by a Sale (a) of the Security the Extent of his Debt is ascertained; 2dly, that a Creditor, having obtained Property of the Bankrupt after, or on the Eve of, an Act of Bankruptcy, cannot prove, until he has delivered up that Property. No one can doubt, that the Object of this Petitioner is to consult his own Interest by choosing himself sole Assignee, or perhaps joining some particular Friend. The Question therefore is, independent of the Objection, that until a Sale of the Securities the Amount of the Debt cannot be liquidated, whether the Commissioners ought to have received a Proof, seeing, that it

(a) A Valuation is sufficient: *Ex parte Nunn*, 1 Rose's Bank. Cas. 322.

must

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must command the Choice of Assignees, and aware of the Purpose, to which it was to be applied, to serve the Interest of this individual Creditor against the general Interest of all the other Creditors; whether the Commissioners should do To-day what your Lordship will order them To-morrow to undo; as your Lordship would certainly remove an Assignee, chosen under such Circumstances. The Cases of *Ramsbottom* and *Homer* are recent Instances. The Inconvenience of such an Appointment is obvious. It cannot be supposed, that as Assignee he would be inclined to institute against himself Proceedings, which the Interests of the general Creditors demand; and though that might be provided for, he may from the intermediate Possession of the Proceedings, with all the Papers, containing the Evidence against him, acquire an Advantage, which no subsequent Arrangement could remedy. The Offer to deposit the disputed Property, which however does not extend to the Bills, or otherwise to secure it, is immaterial. The Object is not Security, but that this Creditor shall not avail himself of the Amount of his Debt to prevent a fair Trial of the Question, which his Conduct with full Knowledge of the Forgery has raised.

*Sir Samuel Romilly, in Reply.*

Even your Lordship has no Power to do that, which the Commissioners have done. The Question simply is, whether a Creditor has not a Right to prove his Debt, which is not disputed, or whether that Right is to be taken from him on a mere Presumption, that he will subsequently abuse the Power he would by proving acquire under the Statute; which must have contemplated the Case of conflicting Interests, yet has prescribed the positive Rule, that the Amount of the Debts, not the Number of Creditors, shall decide the Choice of Assignees. The present Consideration

sideration is not, whether your Lordship would remove *De Tastet*, if chosen Assignee, but whether he is, or is not, to be allowed to vote in the Choice of Assignees. No Instance can be produced of interfering to prevent that; or of exacting a Stipulation, that he shall, if allowed to prove, vote in any particular Way. This is not an Application to your Lordship's Indulgence. The Petitioner stands here insisting on his Right; as it is admitted, that he is a Creditor of the Amount, to which he submits to restrain his Proof. The Question, whether your Lordship would remove the Petitioner, if chosen Assignee, must depend upon Circumstances, which are not to be pre-judged.

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*The Lord Chancellor.*

I was not aware, that another Petition had been presented, that this Petitioner might be permitted to prove his Debt upon Terms: or I should have looked to some Cases, which I think bear upon this. I will not however on that Account delay the Opinion I have formed on Principle.

I referred this Case back to the Commissioners for more Reasons than One: First, that it was stated to me, that the Commissioners had not determined, whether the Proof should be admitted, or not; in which Case it ought not to have been brought before me: for another more important Reason; that, it being stated, that the Proof had been rejected upon an habitual Practice, founded upon a Power in the due Exercise of a Discretion to reject a Proof under such Circumstances, I wished the Commissioners to consider, how that really stood. It seemed to me an extremely disputable Principle in a Court of Justice, that a Man shall not vote in the Choice of Assignees, because, if chosen Assignee, I should remove him; that it is assuming,

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Modification of the Rule, that an Assignee with an Interest adverse to the other Creditors may be removed, by limiting and controlling his Powers, where Sales or other important Transactions have taken place. In such a Case, One Assignee ordered to bring an Action against the other, admitting the Plaintiff to be sole Assignee.

suming, that he would exercise that Right for the Purpose of choosing himself.

With regard to the Power of the *Lord Chancellor* to remove an Assignee afterwards, if he has an Interest adverse to the other Creditors, it is too late now to dispute that Power, which has been constantly exercised; and it is usually stated from the Bar, as raising a *prima facie* Case for Removal, that nothing has been done by the Assignee since his Election; and that he has a material adverse Interest. The Court has in many Cases modified that Rule; assuming that to be the Rule. If the Assignee has been permitted to act, if Sales have been made, and Transactions of Importance have taken place since his Election, the Rule has been modified by limiting the Exercise of his Powers in that Character, and giving Powers to others, who had no adverse Interest; to prevent the Mischief, that would arise from having an Assignee with an Interest adverse to the other Creditors. Accordingly, in a very late Case, One of Two Assignees having an adverse Interest, I directed an Action to be brought by the other Assignee against him; and that he should admit the Plaintiff to be the sole Assignee.

This Case is therefore to be considered, first, with reference to the adverse Claim of this Petitioner; and, secondly, as to his Interest in the Bills. As to his adverse Claim, whether he is to be chosen, not by himself but by other Creditors, either sole Assignee, or a joint Assignee, I am not now to determine, whether I am to remove him. It is enough to say, this Case furnishes a strong adverse Interest; supplying a Question very likely to be tried between this Petitioner and the general Creditors; and it may in that View be very probable, that, if chosen sole Assignee, he will not be permitted to remain so: but that Question I cannot determine, until it is brought before

before me distinctly with all the Circumstances; and it would not be just to this Petitioner to assume, that he will choose himself, if this is a Case, in which he ought not to be Assignee. If he should do so, an Application may be made, and will be decided, without Delay; as it ought to be; for, if, before an Assignee has acted, a clear, valuable, adverse, Interest appears, his Removal is almost of course. So, the Court has said, that a Person with a clear, valuable, adverse, Interest shall not vote in the Choice of Assignees; but has never *a priori* restrained him from voting; and it would be too hasty to restrain him from voting for an unobjectionable Person. His adverse Claim therefore is not a Circumstance, which ought to prevent his proving his Debt; but will be a Circumstance extremely material to be considered, if after the Proof it should appear, that a Use was made of it, which would not be permitted: but I will not anticipate that.

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As to the Security, it is clear, that the Proof is to be for so much as remains, after as much has been made of the Security as can be; and the Reason of not admitting the Proof in such Cases is, that the Amount of the Debt is not ascertained: but that does not apply to Bills; which are not like an Estate, that may produce more, or less; of which no Estimate can give the true Value: but, if the Holder of Bills will take them at the Amount, which upon the Paper they import to secure, they may be worth less, but cannot be worth more; and, deducting the Amount, he is in the Situation of any other Creditor.

Upon the whole, presuming to say nothing as to what will be done under the Circumstances, except that, if there should be a Necessity for a future Application, and it should appear, that the Petitioner has an adverse Interest, founded on a serious Question of Law, applied to Facts,

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his Election as Assignee will be a hopeless Project, but not anticipating that, I think, he has a Right to prove upon the Terms proposed. I do not say, the Commissioners have done wrong; as there is a great Difference between what they can do and what the *Chancellor* can do: but my Opinion goes this length, that I do not think I have the Power to prevent his proving, because there may be a Use made of the Proof, which would not be permitted.

Therefore let him prove upon the Terms proposed. He must for the present deduct the Amount of the Bills certainly.

Feb. 12.

De Tastet, having proved his Debt under that Order, and *Sotilla*, a Creditor for £10,000, were chosen Assignees; and a Petition was presented, praying the Removal of *De Tastet*.

Mr. *Leach*, and Mr. *Montague*, in support of the Petition.

The Result is just what was foreseen: an Appointment of Assignees, upon which your Lordship's Interference is indispensable. One is *De Tastet* himself; having an Interest decidedly adverse to the other Creditors in the important Question upon his Right to retain Property, obtained under such Circumstances: the other is a *Spaniard*, unacquainted with the *English Language*, the intimate Friend of *De Tastet*, and under his Influence. The late Case of *Ramsbottom* is decisive, that an Assignee, who insists on holding Property against the general Creditors, shall be removed. These Assignees not having acted, there can be no Objection to their Removal.

Sir

Sir Samuel Romilly, Mr. Bell, and Mr. Shadwell, for the Assignees suggested, that the Question might be tried without removing *De Tastet*, by appointing another Assignee for the particular Purpose of investigating his Claim to retain the Property in Dispute.

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Ex parte.

The Lord Chancellor.

With regard to *Sotilla* it is unnecessary to say any Thing: the Petition not praying his Removal, I can make no Order with respect to him. As to *De Tastet* I feel very much the Circumstance, that he must now be a Creditor for £86,000; and may be so for a great deal more; and, if I could be quite sure, that I foresaw sufficiently to provide by any Modification of the general Rule, so as to secure the Interest of all the Creditors, I should be glad to take such a Course. It strikes me, that this may be attained by appointing One of these Petitioners a Co-assignee; the Person so appointed to be the only one to act in the Investigation of *De Tastet's* Demand; and, if no more Objection can be stated, I will make that Order; directing, that such Person shall be considered as the sole Assignee in the Investigation of this Demand, and shall be at Liberty to bring such Actions and Suits as may be adviseable; taking Care, that the Title of *De Tastet*, as Assignee, shall not be set up against them. As to the Costs of this Application, it is of course to give them out of the Fund. The Costs of the subsequent Proceedings must depend upon their Issue.

Mr. Montague objected, that Inquiries previous to the Trial would be necessary, and Difficulties would be thrown in the Way of the new Assignee by the others. The Order was however made according to the *Lord Chancellor's* Suggestion.

1812,
LINCOLN'S
INN HALL.
Dec. 11, 12.

Punishment for Contempt by marrying a Ward of Court by Commitment, or in a flagrant Case by directing a criminal Prosecution for Conspiracy, &c., the Subject of sound Discretion; and though the Right to interpose, without Complaint is not affected by Time, the Exercise of it was dispensed with upon Circumstances; no Complaint made for Eight Years; the Husband,

THE Master's Report stated the Marriage on the 9th of July, 1804, of *Francis Lee* and *Catherine Ball* by Banns: *Francis Lee* being then in the Thirty-sixth Year of his Age, and *Catherine Ball* in her Seventeenth Year; that the Marriage was had without the Consent of *Sarah* the Wife of *Thomas Johnson*, the Mother of *Catherine*, appointed by the Court Guardian of her Person; and after a Proposal by *Lee* in the February preceding through the Mother and Guardian had been rejected both by the Mother and the Daughter.

Catherine Ball being entitled to considerable personal Property in the Event, that she should live to attain the Age of Twenty-five Years, by Indentures of Lease and Release, dated the 15th and 16th of July, 1805, *Francis Lee* in consideration of the Fortune of *Catherine Ball* conveyed Estates at *Culcutta* in the *East Indies* and Estates in the County of *Lancaster* and other Leasehold Property and Funds, to Trustees; upon Trust to sell and to stand possessed of £10,000, £3 per Cent. consolidated Bank Annuities, therein mentioned to have been transferred by *Francis Lee* to them, and the Monies to arise from the Sale of such Estates, upon Trust to pay £300 a

Year, though his Conduct would have justified Punishment on a recent Application, not being a needy Adventurer, but of equal Family and Fortune; having actually made a considerable Settlement; under which the Children had vested Interests; and alledging Misconduct by the Wife. The Interests of the Children not to be affected: but the Settlement varied as between the Husband and Wife by increasing the Pin-money, giving her some Interest in future Property, &c.

Pin-money subject to the Property Tax; not to a Deduction for Aliimony; as it is clear of Maintenance.

Year

Year to the Wife for her separate Use for Pin-money during the joint Lives of herself and her Husband, and the Residue to the Husband; in case of her surviving him to pay her £500 a Year, and the whole yearly Proceeds to him, if he should survive her: and as to the Principal in Trust for the Children of the Marriage after the Deaths of the Parents, equally, with Survivorship, subject to the joint Appointment of the Parents, or in Default thereof to the Appointment of the Mother surviving.

1812.

Ball

v.

Courts.

On the 11th of April, 1806, Mrs. Lee was delivered of a Son, and on the 4th of August, 1810, of a Daughter. Mr. Lee having instituted a Suit in the Ecclesiastical Court against his Wife for Adultery, on the 4th of December, 1811, a Sentence of Divorce and Separation a Mensa et Thoro was pronounced,

The Master's Report stated, that the Sum of £300 a Year, allowed by the Settlement for the separate Use of Catherine Lee, was not at the Time a sufficient Provision for her, considering her Fortune; and that £600 a Year ought to have been allowed; submitting, whether after the Divorce it ought to be encreased; but in most other Respects approving the Settlement. Mrs. Lee objected to the Report; insisting, that, as she was at the Time of her Marriage a Ward of the Court, and Mr. Lee married her in a clandestine Manner without the Consent or Knowledge of the Court, the Master ought to have stated, that the Settlement was not proper; and that her whole Fortune in Possession and Expectancy ought to have been secured for her and her Issue, according to the Case of Millet v. Rowse (a). The Master having over-ruled the Objection, a Petition was presented by Mrs. Lee, that he may be directed to review his Report; that the Settlement may be

(a) 7 Ves. 419.

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declared

CASES IN CHANCERY.

1812.
~~~  
BALL  
v.  
COURTS.

declared not a proper Settlement; and that the whole of her Fortune may be settled on her and her Issue; and in addition to the Circumstances before stated alledging her Age at the Time of the Marriage; that the Banns had been twice published, before she was made acquainted with it: that Mr. Lee in his Letters directed her, if the Clergyman should inquire her Age, to say she was Twenty-four; and stating cruel Usage and Desertion on the Part of her Husband, and that she had received nothing from him for the last Three Years.

Another Petition was presented by Mr. Lee, praying a Declaration, that the Settlement was proper, and a Transfer to him of his Wife's Property; stating, that in marrying without Consent of the Court he had acted, though unadvisedly, from Motives of Affection and Regard to his Wife; that he considered himself equal in Family and Fortune to her; that the Settlement was prepared and approved by her Friends and Counsel; that he had uniformly treated her with Kindness and Affection; and by his Indulgence had incurred great pecuniary Embarrassment, not having yet received any Part of her Fortune; that he was deceived as to her Age; believing it to be as stated both from her own Representation, and her general Appearance; also contending, that, as the infant Son took a vested Interest, the Settlement could not be altered.

Sir Arthur Piggott, and Mr. Hart, in support of Mrs. Lee's Petition, contended, that under the Circumstances of this Case the whole of the Wife's Fortune ought to be settled to her separate Use, and upon her Issue; excluding the Husband from any Participation in it; referring to *Stevens v. Savage (a)*, *Like v. Beresford (b)*, *Winch v.*

(a) 1 Ves. 154.

(b) 3 Ves. 506.

Jones

*Jones (a), Chassaing v. Parsonage (b), Wells v. Price (c), Millet v. Rowse (d), Bathurst v. Murray (e), Halsey v. Halsey (f), and Pearce v. Crutchfield (g).*

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Mr. Richards, for the Trustees.

Sir Samuel Romilly, and Mr. Bell, in support of Mr. Lee's Petition.

The Cases cited are Instances of the Seduction of young and inexperienced Women, stolen from the Protection of their Friends by desperate and needy Adventurers. This is a Case of a perfectly different Character: a Marriage of a Ward of the Court, certainly without Consent, and therefore not to be justified; but the Husband a Gentleman of Family and Fortune; who actually settled £1000 a Year: a Connection, which this Court would have approved, had an Application been made for its Sanction. The Court has not in this Instance the Means of compelling a Settlement; as in most of the Cases referred to; where the Parties were committed; and the Execution of a Settlement was made the Condition of their Release. This cannot be compared to the Case of a Settlement merely voluntary, the whole Property belonging to the Wife; as in *Wells v. Price (h)*, and *Halsey v. Halsey (i)*: nor to *Like v. Beresford (k)*; an Attempt by Creditors of the Husband to interpose for the Purpose of taking from the Court the Power of making a proper Settlement; which the Court would not allow.

(a) 4 Ves. 386.  
(b) 5 Ves. 15.  
(c) 5 Ves. 389.  
(d) 7 Ves. 419.  
(e) 8 Ves. 74.

(f) 9 Ves. 471.  
(g) 16 Ves. 48.  
(h) 5 Ves. 398.  
(i) 9 Ves. 471.  
(k) 3 Ves. 506.

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Sir Arthur Piggott, in Reply.

Admitting this Settlement to be in itself not materially improper, it must be looked at as connected with the Circumstances. This is not the Case of a young Man led away by the Violence of his Passions: but this Conduct, had the Court been made acquainted with it at a more early Period, must have been the Subject of Inquiry elsewhere. No Rule is better settled than that a Man, who has conducted himself in this Manner, shall derive no Advantage from his Wife's Property. The Court must discourage such Conduct by withholding that Property, which is its Object. This Settlement is voluntary so far as the Wife is concerned; being made after Marriage, and not in consequence of any Agreement before Marriage; nor could the Child claim against the Equity of the Wife. The Case of *Like v. Beresford* (a) has no such Circumstances as these: the Assignment was made for valuable Consideration before the Decree: yet the Court even in that favourable Case would not let in a Claim by Assignment from a Husband, who had married under such Circumstances.

*The Lord CHANCELLOR.*

Dec. 12.

I feel very strongly the Propriety of the Expectation, which has been expressed, that I shall look into the Documents of this most important Case; and with extreme Apprehension, that in the Course of hearing such a Case Considerations, arising out of imputed Immorality, may have more effect, than they should have, upon a judicial Determination of what I ought to do, I shall take some Time, with the View to protect myself from that Danger.

(a) 3 Ves. 506.

With

With regard to the Divorce, whatever the Legislature may do upon the Fact of Adultery, I am bound to consider these Parties as Man and Wife ; as having One Child by the Admission of both, and, according to the Theory of the Law, Two Children, of that Marriage. I am not therefore to consider their Separation as a Dissolution of the Marriage.

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~~  
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v.  
COUTTS.

In sending this Case to the Master, though a Case of Contempt, I illustrated the Principle, upon which I have uniformly acted ; that what the Court will do upon the Head of Contempt must be the Subject of its sound Discretion. Of the peculiar Circumstances, now brought forward on both Sides, I knew nothing. It is not at present my Intention to say more than this ; that, if it was intended at the Bar to dispute the Right of the Court to take Notice at any Time of a Contempt, committed by marrying a Ward of the Court, I do not agree, that Time will affect the Right of the Court to interpose. On the other Hand I have no Doubt, that, as the Jurisdiction upon this Head must be exercised according to a sound Discretion, in Cases of that Sort, especially in such a Case as this, many Circumstances must be considered, before the Court determines, what is to be done.

I have no Difficulty in stating upon these Affidavits, that, if the Case had been brought forward immediately after the Marriage, however painful the Duty of interfering in this Branch of the Jurisdiction, inflicting personal Sufferings upon Parties, I could not have withheld the Application of that Jurisdiction ; unless I had taken another Course ; and I take it to be entirely competent to this Court, as I have illustrated in my Practice, not to confine itself to Commitment for a Contempt, but in a Case, calling for severer Punishment, to direct Prosecutions, of various

1812.

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BALL  
v.

COURTS.

Immorality,  
as such, not pu-  
nished in Equi-  
ty; but consi-  
dered in pu-  
nishing Con-  
tempt.

various Kinds: in some Instances for a Conspiracy, in others, as in the Case of *Millet v. Rouse*(a), for an Offence of another Description: not that this Court is to punish Immorality, as such: but, if it discovers, as in that Case, gross Immorality in Circumstances, forming a Contempt, the Court has always been in the Habit of attending to such Circumstances. When that Case occurred, I was Attorney-General; and Lord *Loughborough* directed me to look into the Circumstances, and prosecute. We had a Difficulty in prosecuting for Perjury; that the Statute does not give the Power of administering an Oath: but I found Authority enough for indicting. It was not for Immorality that the Prosecution was directed; but for an Act done in the Course of committing a Contempt of this Court; and *Thompson* was convicted; and suffered the Pillory.

I do not mean to represent this to be such a Case as that: but, if this Case had been immediately brought forward, I should have thought the only Notice to be taken of it was by Commitment. I cast no Reflection upon any of the Gentlemen, who were consulted professionally, for not bringing it before me. It is much too delicate a Subject for Blame, that they did not expose Persons, consulting them professionally; and though some Gentlemen would have refused to be concerned, that is too much to expect from a professional Man. It is too much even to suppose, that he has a Right to say so. No Blame therefore attaches to the Fact, that the Court did not sooner hear of these Matters.

The Court however has now heard of them; and I do not agree, that there must be a Complaint. The Court, if informed of such a Transaction, has a Right, and may

(a) 7 Ves. 419.

under

under Circumstances be bound, to take Notice of it ; and the Fact, that there was no Complaint, if it stood alone, must have Weight in the Question, whether the Court is to interfere. This Case goes far beyond that. It is evident, that the moral Natures of these Marriages, with Wards of the Court or not, differ as much as Light and Darkness. Some are very flagitious: others venial. I agree, the Marriage of any young Lady against the Consent of her Parents or Family is thus far to be regarded as an Act not to be approved, that it imposes on the Husband an Obligation to make Atonement during his whole Life: but under many Circumstances it is excusable; and it may have arisen from an imprudent exercise of very virtuous Motives. If however a Marriage of that Sort is a Robbery both of the Person and Fortune of the Lady, I say, that in a moral View, though I have nothing to do with that, there are few Crimes more aggravated.

1812.  
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BALL  
v.  
COURTS.

Under whatever Circumstances the Marriage was had, these Parties, it is said, lived together many Years in conjugal Happiness: but after the Birth of One Child, acknowledged by both, and of another, whom for the Purpose of this Settlement I must consider as belonging to them, that Happiness was determined by the Adultery of the Lady; and the Question now is, what I am to do with reference to this Contempt, committed in 1804, disclosed to the Court in 1812, with all the Circumstances occurring in the Interval; and what I am to do in Point of Settlement; not considering, whether it is a voluntary Settlement or not; and if it is, clearly by the Approbation of the Court it will become not voluntary.

The Principle, I admit, is, that the Wife has the same Right to call upon me for a proper Settlement, as if no such Settlement had been made: but I must also consider,

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 BALL  
 v.  
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sider, how far the Interests of the Children may be affected; and a farther serious Consideration is, that, if the Court is satisfied, that this Sort of Proceeding has been a Mode of purchasing off the Notice of the Court, that Circumstance, when it comes to the Knowledge of the Court, must receive Attention. Sensible of the Importance of this Case, I shall consider it with an Anxiety to guard against permitting any Thing to be mixed with my View of the Circumstances, except what belongs to a judicial Consideration of them.

1813,  
 Jan. 13,

No Means of enforcing a Settlement on Marriage of an Adult, unless the Husband seeks to obtain her Property in Court: but, if the Marriage is a Contempt, the Court, vindicating its Jurisdiction by Imprisonment, compels a Settlement.

*The Lord CHANCELLOR.*

When a Lady, having Property in this Court, marries after she is of Age, the Court does what it can to obtain a proper Provision for her: having, as there is no Contempt committed, no Means of enforcing a Settlement, if the Husband does not seek to lay his Hands upon the Property: but, if the Marriage is a Contempt, the Court, vindicating its Jurisdiction, is enabled by Imprisonment to compel the Husband to make a proper Settlement. In this Case the Court was not informed for Eight Years of the Contempt, that was committed; and considering the Case with the View to determine, how far it ought to interpose on that Ground, the Court always has Regard to the subsequent Conduct.

The Scheme of this Settlement, with regard to the Property of the Husband, is to devote the Whole of that settled Property to his Children by this Marriage, without any Reservation for Children by any other Woman, equally, with Survivorship, subject to the joint Appointment of the Parents, or, in Default of a joint Appointment, to the Appointment of the Wife surviving; though the Property was the Husband's. This Settlement, though in

its



its immediate Effect proposing to secure about £1000 a Year on the Part of each, really binds all the Interests, which Mrs. *Lee* might take by the Deaths of any of her Brothers and Sisters, who have a Fortune equal to her's, in Infancy or before Marriage; binding all her Interests, either in actual Expectancy, or that might happen to devolve upon her: the Subject of Settlement on his Part being only a Capital, producing £1000 *per Annum*. There is, I understand, no such Instrument actually in Force, as is suggested to have been executed by her just before the Birth of the first Child, operating as an Execution of the Power over this Fund; the Capital of which therefore is now undisposed of; and, if there are no Children having a vested Interest, the Trust is for the Husband, his Executors, &c. There is no Increase even of the Pin-Money, no Interest whatsoever to her during his Life in the Produce of Property devolving to her. As to the Legitimacy of the Daughter, which is disputed by Mr. *Lee*, the Court cannot enter into that Question; but must for the present take her to be legitimate.

1813.  
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BALL  
v.  
COURTS.

Both Parties are dissatisfied with the Master's Report. The Petition of Mrs. *Lee* insists, that the Settlement ought to be according to that, which was directed in the Case of *Millet v. Rouse* (*a*); devoting to her separate Use the whole Proceeds of her Fortune in Possession and Expectancy, and providing for her Children by any Husband; grounding this Claim upon what is represented to have been the Doctrine of the Court, as applied to a Person in her Situation, married as she was, a Ward of the Court, the Marriage therefore without Leave being a Contempt by the Husband; and partly also upon Objections urged against the Settlement, as prepared, even if she should not

(*a*) 7 Ves. 419.

be

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 v.  
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be entitled upon the Circumstances attending her Marriage.

When that Petition, which communicated the Fact of the Marriage of a Ward of the Court without Leave, and therefore a Contempt committed by the Person so marrying, was first before me, I knew no more than that Fact, that a Contempt was committed in 1804; that it was not mentioned to the Court; that they lived together, as I must take it, in Harmony, until 1812; and then on the Part of the Wife Elopement, Adultery, and a Sentence of Divorce *a Mensâ et Thoro* on that Account, took place; and though I have no Doubt, that, whether the Communication of the Fact, that a Contempt has been committed, comes early or late, the Court has Jurisdiction, and may feel a Duty, to punish that Contempt, yet it would not be a very wholesome Exercise of Discretion to visit that Offence strongly, if upon Attention to Circumstances, that have occurred in the Course of Six, Seven or Eight, Years, not very strongly called upon to vindicate the Jurisdiction; and in these Cases, where it is exercised really for the Benefit of the Party, the Court ought to look with great Attention to all the Circumstances of each Case.

Facts have been since disclosed, which are said to be irrelevant: but I cannot agree, that the Manner, in which the Marriage has been contracted, may not call for great Attention in the Formation of the Settlement of the Lady's Fortune. These Circumstances, which have since come to my Knowledge, not only justify, but, if the Communication had been recent, would have compelled me to take, very strong Steps in support of the Jurisdiction; and I do not think, I could have been excused, if, besides taking Care of her Fortune, I had not directed a Prosecution for a Conspiracy against these Parties.

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The Question, now before me, is a very difficult one. First, this is not at this Moment a Case, where the only Interests to be considered are those of the Husband and Wife; as I do not see my Way to any Alteration of this Settlement, which would prejudice the admitted Interest of One Child; and that, which I must at present take to be an existing Interest in the other. This Court could not permit the Husband to do any Act, which would disappoint those Interests. As to the Capital therefore, and the Interests of the Children in that Capital, I have not the Power of making any Alteration; if it was fit to do so.

Another View of this Case is very material. I do not understand the Doctrine of the Court with regard to the Effect of the Marriage of a Ward to be as to her Property precisely as it is represented by Mrs. Lee's Petition. If the Case was such as she states, a Beggar marrying for the Sake of the Fortune, the Court has been in the Habit of not permitting him to touch that Fortune, which was his Object; and in Cases, where there are many good Reasons against so acting, I admit, the Court has generally taken that Course: but it has never gone the Length, that, if this Species of Indiscretion has occurred, which the Court must punish by Commitment, but which brings together Persons of equal Rank and Fortune, and as considerable a Settlement is made by the one as by the other, no Attention is to be given to an equivalent Provision, made by the Husband for the Wife and Issue. That Doctrine has never been stated; and is not consistent with the Principle, on which the Court acts.

It is very difficult to establish, that I can now hold that Settlement to be improper, which the Court, if its Attention had been called to the Subject, would have approved in 1805; not however meaning to say, that this Settlement

1813.  
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BALL  
v.  
COURTS.

Distinction upon Contempt by Marriage of a Ward of Court: a Person of no Property, whose only Object is the Fortune, is not permitted to touch it; and the whole is put in Settlement: otherwise, when the Husband of equal Rank and Fortune makes an equivalent Settlement.

1813.  
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BALL  
v.  
COTTS.

Settlement would have been approved: but the Court would not from subsequent Circumstances disapprove a Settlement, which, if called to the Consideration of it immediately after the Marriage, it would have approved. As to the Conduct of this Lady herself, it would require much more Attention, if it was not to be urged in her Favor, that the Transactions, which took place in the Circumstances of her Marriage, might have led her into that Misconduct, which is now made the Subject of Complaint. There is however this Misconduct; and with regard to exercising the Jurisdiction against the Husband by directing a Prosecution now, it comes somewhat too late for that. I am not disposed either at this Day to exercise that Jurisdiction, which the Court usually executes, by Imprisonment; where a Prosecution is not directed; and as to the Interests of the Children, it is not possible to alter them.



The Result is therefore, that I am inclined to alter in some respects, which I will communicate, the Provision as between Mr. and Mrs. Lee, the Provision as to her Income, but not to the Extent, in which the Master proposes Alteration, as to her future Expectations, by giving her some Interest in what may come to her in consequence of those Expectations. As to the second Point, the £500 a Year, proposed as Maintenance for the Children of that Marriage, I am not quite determined; having considerable Doubts, whether it is wholesome to place Children out of the Control of the Parent by giving them an independent Fortune in his Life. With regard to the other Parts of the Case I shall propose some Alterations; and, abstaining now from directing a Prosecution and Imprisonment for the Contempt, I desire, that this may not be drawn into a Precedent, or stated as an Example in any future Case, not consisting of the same Circumstances;

forbearing

forbearing from that upon Attention to the Facts of the Marriage in 1804; that they lived, as appears to me, in Harmony a considerable Time afterwards, and the Circumstances of the Conduct of both since; and with that Observation I part with the Case.

1813.  
BALL  
v.  
COURTS.

*The Lord Chancellor* on a subsequent Day said, under all the Circumstances the Pin-Money must be £400 per Annum; and that it must be subject to the Property-Tax: but the Alimony should not be deducted; as, if they had lived together, she would have been entitled to Maintenance beyond the Pin-Money.

## KNOWLES v. BROOME.

THE MASTER OF THE ROLLS, for THE LORD CHANCELLOR.

1813.  
LINCOLN'S  
INN HALL.  
Jan. 15.

UNDER a Bill of Foreclosure, the Defendant absconding, an Order was obtained for the Defendant to appear by a certain Day; a Copy of which was according to the Act (a) of Parliament posted up at the Royal Exchange, and inserted in the *London Gazette*; but the Parish Church of Cripplegate, where the Defendant last resided, being then under Repair, the Plaintiff could not comply with the Direction of the Act, requiring, that a Copy of the Order shall be published in the Parish Church immediately after Divine Service.

Time enlarged  
for Appearance to a Bill  
of Foreclosure  
under Stat. 5  
Geo. 2. c. 25.:  
Notice in the  
Parish Church  
having been  
prevented while  
under Repair.

(a) Stat. 5 Geo. 2. c. 25. s. 1.

## CASES IN CHANCERY.

1813.

Knowles  
v.  
Broom .

The Repairs of the Church being compleated, the Plaintiff moved, that the Defendant may be ordered to appear to the Bill on or before the 27th of February next.

Mr. Shadwell, in support of the Motion, mentioned the Case of *Wilkinson v. Coker (a)*.

*The Master of the Rolls made the Order on the Authority of that Case.*

(a) 1 Dick. 74.

1813.

LINCOLN'S  
INN HALL.

Jan. 15.

Feb. 25.

The Process  
to obtain a Decree *pro confesso* not applied to a Prisoner in Newgate under a Criminal Sentence; who if brought up by the Order.

*Habeas Corpus,*

must be remanded immediately; and

cannot, as in a Civil Case, be turned over to the Fleet cum causis, subject to the farther Process by *Alius Habeas Corpus, &c.*

MOSS v. BROWN.

THE Defendant, confined under Criminal Process, having been brought up from Newgate, turned over to the Fleet, and then carried back to Newgate (a), under the Order of this Court, the Plaintiff moved, that he might, unless the Defendant should put in his Answer by a certain Day, be at Liberty to apply for the Clerk in Court to attend with the Record of the Bill, in order to take it *pro confesso*. The Register declined drawing up the Order.

Mr. Shadwell, for the Motion, relied on *Pendergrast v. Saubergue (b)*.

(a) *Moss v. Brown, ante,* (b) 2 Dick. 535.

78.

The

1813.

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Moss

v.

BROWN.

*The Lord Chancellor.*

The Case of *Rogers v. Kirkpatrick* (*a*) shews the Difficulty of applying this Process to Criminal Cases; and the Reason is, that the Writ of *Alias Habeas Corpus* cannot issue except to the Prison of the Court. A Defendant, confined in another Prison in a Civil Case, is turned over to the *Fleet cum causis*; and may be brought up repeatedly: but, when brought up from Confinement under a Criminal Sentence, he must be returned immediately: he cannot be kept an Instant (*b*). The Difficulty, which is not the less material as being an Objection of Form, is, that the Defendant is not in a Place, where the Process of this Court can reach him.

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No Order was made (*c*).

(*a*) 3 Ves. 471. 573.

(*b*) *Lloyd v. Passingham*, 15 Ves. 179. In *The Attorney-General v. Smith*, 1 Dick. 135, the Cause of the Imprisonment does not appear.

(*c*) As to the Process under the Statute 5 Geo. 2. c. 25, against an absconding Defendant, see *Knowles v. Broome*, the preceding Case.

1813.

LINCOLN'S  
INN HALL.  
Jan. 15.

**GRIFFITH v. WOOD.**

A GENERAL Demurrer having been allowed in April 1812, and the usual Order drawn up for the common Costs, the Defendant moved for the full Costs, on the Ground of the Plaintiff's vexatious Conduct; the Bill, to which the Demurrer was allowed, being general Order, 1794, upon a subsequent Application.

Full Costs on a Demurrer allowed to a third Bill for the same Cause, under the Ge-

## CASES IN CHANCERY.

1813.  
 ~  
 GRIFFITH  
 v.  
 WOOD.

the third filed by him for the same Cause; and he had since filed a fourth.

Sir Samuel Romilly, and Mr. Cooke, for the Motion, referring to the General Order of Lord Loughborough and Lord Alvanley (a) said, the Objection, that farther Costs had not been given, when the Demurter was allowed, had been over-ruled upon a Plea allowed to one of the former Bills: the Court giving farther Costs upon a subsequent Application.

*The Lord CHANCELLOR made the Order.*

(a) 6th February, 1794, 4 Bro. C. C. 545.

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1813,  
 Jan. 27, 28.  
 Feb. 12.

TOBIN, *Ex parte.*

Certificate un-  
 der a separate  
 Commission of  
 Bankruptcy,  
 lying before the  
 Lord Chancel-  
 lor for Allow-  
 ance, not stay-  
 ed by suing out  
 a joint Com-  
 mission.

Order allow-  
 ing the Certifi-  
 cate, impound-  
 ing the sepa-  
 rate Commis-  
 sion, and trans-  
 ferring the Pro-  
 ceedings and Proofs to the other Commission.

THIS Petition was presented by a joint Creditor, who had taken out a joint Commission of Bankruptcy; praying, that a separate Commission against One of the Partners may be superseded; which was resisted on the Ground, that under the separate Commission the Certificate had been obtained; and lay before the Lord Chancellor for Allowance.

Sir Samuel Romilly, in support of the Petition.

Even if the Bankrupt has absolutely got his Certificate, your Lordship will either supersede the separate Commission, or give the joint Creditor an Opportunity of assenting to or dissenting from the Certificate; as in the late Cases, *Ex parte Fowler, Patten, and Wilson*, without any Pretence of Misconduct. The only Object of this Petition

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tion is, that the first Commission may proceed without all the Difficulty, that must be the Consequence of sustaining the separate Commission. Admitting the Conduct of this Bankrupt to be fair, he has obtained his Certificate with great Expedition, in Three Months from the Date of the Commission : the Debts proved under that Commission being only £400 ; though he is a Debtor to the Amount of £60,000 ; and no joint Creditor having proved except the petitioning Creditor. The great Inconvenience that may ensue, will induce your Lordship to pause, before you decide, that a Certificate, signed in Three Months under a separate Commission, the other Partner not having then committed an Act of Bankruptcy, shall prevent a joint Commission.

*Mr. Bell*, for the Bankrupt under the separate Commission, urged, that the *Lord Chancellor* in *Ex parte Hamper* (*a*) and many other Cases had declared, that a Certificate, having got the Length of being laid before the *Lord Chancellor* for Allowance, should not be defeated by suing out a joint Commission.

*The Lord Chancellor* said, the Bankrupt must have his Certificate on this Ground ; that the Petitioner had permitted it to proceed, until it was ready for Allowance without any Application to come in for the Purpose of assenting or dissenting ; under which Circumstances it would be very hard to permit him to stop it.

Jan. 28.

*Mr. Bell* mentioned *Ex parte Leaverland* (*b*) ; as confirming the Opinion expressed in *Ex parte Hamper*, that

Feb. 12.

(*a*) 17 *Ves.* 403.(*b*) 1 *Atk.* 145.

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1813.  
TOBIN,  
*Ex parte.*

the Certificate would be destroyed by superseding the Commission.

*The Lord CHANCELLOR.*

I think, I may grant the Certificate, impounding the Commission with the Secretary, not to be produced without my Order. That was the Course I adopted in the late Case *Ex parte Rawson* (a), superseding the joint Commission against the Two. I will make that Order with the Addition, that all the Proceedings and Proofs of Debts shall be transferred to the other Commission,

(a) *Ante*, p. 160.

1813,  
Feb. 11.

Order to dismiss the Bill for Want of Prosecution, though regular according to the present Practice, not requiring Notice, if before Replication, nor the Six-Clerk's Certificate at the Time of making the Motion, discharged without Costs upon the Defendant's Laches.

**BROWNE v. BYNE.**

**I**N May, 1809, a Bill was filed for the specific Performance of an Agreement; and a Bill for the Purpose of having it delivered up to be cancelled: in both Suits Answers were put in. On the 30th May, 1811, the Defendants in the cross Cause obtained an Order to dismiss the cross Bill for Want of Prosecution; but the usual Certificate, obtained from the Clerk in Court for that Purpose, had not, when signed by the Six-Clerk, the proper concluding Words, "since which no farther Proceedings have been had." Those Words were afterwards added by Interlineation. That Order was not drawn up: but another Motion was made on the 12th May, 1812, to enter the Order *nunc pro tunc*; and the Order, made on that Motion, was not served until the 30th of January, 1813.

A Motion

A Motion was made to discharge the Order to dismiss the cross Bill on Affidavit of these Facts, and that no Notice was given of the Motion to dismiss.

1813.  
Brown v.  
Byne.

Mr. Hall, in support of the Motion, contended, that the Order had been obtained by Surprise, and against the usual Courtesy of Practice.

Mr. Cullen, for the Defendant, insisted, that the Order was regular, according to the Practice, as now settled, that Notice is not necessary (*a*).

#### *The Lord Chancellor.*

This Motion depends on Two Circumstances. If the Words interlined stood originally Part of the Six-Clerk's Certificate, then the Order to dismiss the Bill was regular: if those Words were not originally there, it will probably turn out, that the Register, when applied to, for the Order, observed the Omission; and those Words were afterwards inserted by the Six-Clerk. Considered with extreme Strictness this is not regular; as, when the Application is made to the Court, I must understand the Order as at that Time made, and the Recital as correctly true; which it was not: but that strict Regularity would introduce Mischief in actual Practice: the general Convenience being much forwarded by this Attention of the Registers (*b*).

The Point, now to be considered, is, what has been done upon that Order; and, if nothing has been done,

(*a*) *Degrates v. Lanc.*, 15 *Ves.* 291. *Naylor v. Taylor,* *Ves.* 402. *M'Mahon v. Sis-Jackson v. Purnell,* 16 *Ves.* 12 *Ves.* 465.

127. 201.

1813.  
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 Browne  
 v.  
 Byss.

whether the Party ought not to be now put in the same Situation, as if upon Notice they had come to the Court; proposing upon the Nature of the Two Causes to discharge the Order to dismiss under the Circumstances of both Causes, and upon Terms. Here is a Bill for the specific Performance of a Contract, and on the other Hand a cross Bill to rescind it. I do not enter into the Merits farther than the Observation, that there is a necessary Connection between these Suits. Answers were put in to both Bills so long ago, that an Order was made on the 30th of *May*, 1811, to dismiss the Bill in the cross Cause on the Ground that no Step had been taken by the Plaintiff in that Cause for Three Terms. That Bill was dismissed by the Order; supposing it regular: but no Proceeding was had for the Purpose of drawing up that Order for a Year; and after that Delay they applied to draw it up *nuic pro tunc*. Having obtained that Order, they take no Step to serve it until the 30th of *January*, 1813. In the mean Time nothing was done in the original Cause.

The present Application is made as soon as could be after the first effectual Service of the Order, made on the 30th of *May*, 1811, the Moment they knew of that Proceeding, to reinstate the Cause. If I could have reinstated it immediately, upon the Nature of both Causes and their Connection, why should I not do so now nothing being done on the other Side; and the Order not served until *January*, 1813.

I have no Difficulty in saying, I will discharge this Order without any Costs; that it may be understood I do so on account of this Delay.

WRIGHT

## WRIGHT v. ATKYNS.

1813,

Feb. 12, 20, 26.

(17 Ves. 255.)

THE Decree, pronounced at the *Rolls* in this Cause (*a*),  
 declaring the Defendant Tenant for Life in her own  
 it, and a Trustee as to the Remainder in Fee for the  
 itself, and giving the Directions prayed accordingly for  
 ing the Charges by a Sale, &c. the Plaintiff moved  
 n Injunction to restrain her from cutting Timber, &c. " Decease she  
 had appealed from the Decree at the *Rolls*.

Mr. Richards, Sir Samuel Romilly, and Mr. Heys, in  
 ort of the Motion; urged, that, whatever Question  
 t be made, whether a Decree should be executed  
 ing an Appeal, there can be no Doubt, that a Party  
 not in direct Defiance of the Decree be permitted  
 irreparable Mischief.

Mr. Leach, Mr. Hall, and Mr. Bell, for the Defendant.

he Effect of this Will is, that the Defendant has the  
 rittance, until she executes what the *Master of the*  
 's considers a Trust. What is the Analogy between  
 an Estate, and a mere legal Tenancy for Life? The  
 does not pray an Injunction; which this Court is not  
 he Habit of granting without a special Prayer: Sa-  
 v. Dyer (*b*); and there is the less Reason to stretch  
 Practice in the Instance of a Trust of this indefinite  
 cription.

Mr. Richards, in Reply.

he Estate, which the Defendant takes under this Will,  
 not be distinguished from a legal Tenancy for Life; and

(*a*) 17 Ves. 255.

(*b*) Amb. 70.

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v.  
ATKINS.

surely without putting the Party to the Inconvenience of filing a new Bill, praying an Injunction, this Court will interpose to restrain a Tenant for Life from committing irreparable Injury. The Decree at the Rolls standing unversed, the clear Right, arising under it, cannot be affected by the mere Omission to pray an Injunction.

*The Lord CHANCELLOR.*

In all these Cases upon Words of Recommendation, Trust, Confidence, &c. the Party has according to all the Authorities from Hobart downwards a Power of Disposition in Favor of any Person, answering the Description at his Death. With regard to the Injunction there is a Distinction upon the Practice: generally if the Bill does not pray an Injunction, the Plaintiff cannot move for an Injunction under the Prayer for general Relief: but if after a Decree for an Account under a Bill for Foreclosure the Mortgagor attempted to cut Timber, the Court would enjoin him, though there was no Prayer for that. I incline to think, that whether the Defendant is Tenant for Life without Impeachment of Waste, or not, after this Decree for a Sale of Part of the Estate the Court would not permit any one to cut Timber in the mean Time. As to the rest of the Case I will grant the Injunction at present; considering it open, if the Defendant chooses to apply at the next Seal.

Feb. 26.

A Motion was made to dissolve the Injunction.

Mr. Leach, Mr. Hall, and Mr. Bell, in support of the Motion.

The Object in cutting this Timber, which was fit for cutting, was to repair the Mansion House, in a ruinous and dilapidated State. The Question is, whether under this Devise the Defendant can be considered in any other

Light

Light than as a Tenant for Life without Impeachment of Waste. She was evidently the primary Object of the Testator's Bounty; who, it must be conceived, intended to give her for her Life the most beneficial Interest. The Court, restraining her Interest to a Tenancy for Life, preventing her Alienation, did not mean to impede or restrain, the full Use and Enjoyment during her Life, as if she had the Inheritance. The Objection, that the Injunction is not prayed, must not be overlooked.

*Mr. Richards, Sir Samuel Romilly, and Mr. Heys,*  
for the Plaintiff.

Until this Decree is reversed, it must be presumed to be right, and accordingly must be obeyed. The Decision in *Dyer (a)*, upon which it is founded, has been approved by Lord *Hobart* and Lord *Hardwicke*. This Decree has decided, that the Defendant is not entitled to the Inheritance; and an Estate for Life is always impeachable for Waste, unless by positive Limitation. That Restraint is an Incident of every Tenancy for Life. The Timber is Part of the Inheritance; as much so as the Soil, Mines, &c. The Power, which it is contended she has by this Devise of selecting the Object, on whom the Inheritance shall devolve, cannot enlarge her Interest; or make it more than a mere Estate for Life.

#### *The Lord Chancellor.*

I have not the slightest Doubt, that the Testator did not mean, that the Defendant should be impeached for Waste: but I cannot avoid the Construction, that her Heir at Law would be a Trustee for his Heir at Law; and then the Consequence must attach. This Sort of Trust is generally a Surprise on the Intention: but it is too late to correct that.

(a) *Chapman's Case, Dy. 333.*

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## CASES IN CHANCERY.

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I certainly do not know a Case, that resembles this. The Effect of the Will, upon the Doctrine of this Court, reducing the Estate to a Tenancy for Life, the Consequence seems to follow; unless it is better excluded than it appears to be by this Will. Conceiving these Cases, upon Words of Hope, Confidence, &c. to be generally decided against the Intention, I have endeavoured to raise a Distinction in the Defendant's Favor, but cannot. I do not believe the Testator intended a mere Trust: but that must be the Construction, if the Word "Family" is properly construed.

1813,  
 Feb. 20, 22.

BYNE, *Ex parte.*

A Person attending Commissioners of Bankruptcy, without a Summons, swearing, that he was a material Witness, and not contradicted, protected from Arrest, while remaining,

though having left the Room by Order for the Purpose of separate Examination; and while returning: whether while going, *Quare.*

Order to be discharged immediately, by the Party in the first Instance; if disobeyed, to be extended to the Officer, with Costs.

Application at the Bar without a Petition the proper Form in such a Case; and Time to answer the Affidavit refused.

Summons,

**A**N Application was made on Affidavit, without a Petition, for the Discharge of a Person, arrested under the following Circumstances.

Under the Order, lately made by the *Lord Chancellor* (a) for proceeding in the Examination of *Bryant*, a Bankrupt, as far as it related to the Title and Value of the Estate at *Woldingham*, a Meeting was held at *Guildhall*; and was adjourned for the Purpose of having a private Meeting; at which *Byne* attended, without a

(a) *Ex parte Bryant, Ante.*

Summons, tendering himself to the Commissioners as a Witness. The Commissioners acceding to a Proposal, that the Witnesses should be examined apart, *Byne* by their Order withdrew; and soon after he had left the Room was arrested at the Suit of the Bankrupt upon a Judgment obtained in the Year 1806.

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BYNE,  
*Ex parte.*

Sir *Samuel Romilly*, in support of the Discharge resisted an Application for Time to answer the Affidavit; observing, that in the mean Time the Party is in Custody unjustly; and referring to *Aylet's Case*; where Lord *Thurlow* took the Examination *viva voce*.

Mr. *Cullen*, for the Bankrupt said, that for the Purpose of an Examination *viva voce* the Client must be produced.

The Lord CHANCELLOR permitted the Application to proceed; observing, that it may happen, that the Client cannot be produced; that this, being in Bankruptcy, is the proper Form of Application; and that it must be heard immediately, in order to an immediate Determination, whether it would be right to act.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Montague*, in support of the Application to discharge.

The only Question is, whether a Person, attending Commissioners of Bankruptcy without a Summons for the Purpose of being examined, is entitled to Protection from Arrest. There is no Doubt of the Right of this Person to be discharged, according to your Lordship's Opinion in *Ex parte King* (a), that a Creditor, attending merely to prove his Debt, without a Summons, is protected. This

(a) 17 Ves. 312. See 316.

Person

## CASES IN CHANCERY.

1813.  
—  
BYNE,  
*Ex parte.*

Person attended in consequence of your Lordship's Order, to give material Information relative to the Estate, which was the Subject of that Order; and having also a Claim on the Proceedings under this Commission, depending on his Right to this Estate, which he sold to the Bankrupt, but has never received Payment. Immediately on leaving the Room by Order of the Commissioners, who thought it right, that the Witnesses should be examined apart, he was arrested under a Judgment, obtained by the Bankrupt in 1806. The public Meeting at *Guildhall*, restrained by the late Order to an Investigation of the Title and Value of this Estate, was adjourned for the Convenience of the Bankrupt, that the Inquiry might not be public. The Protection clearly extends to all Persons, generally, coming to assist in the Administration of Justice. This Person was attending at the Moment for the Purpose of being examined; and went out by the Direction of the Commissioners merely while the other Witnesses were under Examination. He was arrested upon a Writ, issued on the same Day, while the Inquiry was proceeding, by the Bankrupt; who is not the Creditor; the Right to the Debt having passed to his Assignees. The Arrest is therefore clearly illegal; and the Costs are not an adequate Compensation.

Mr. Cullen, for the Bankrupt.

The Extension of the Privilege now sought goes beyond all Precedent. In the Case of *Meekins v. Smith* (a) the Party, though attending certainly without a Summons, was called on to attend in respect of the Relation he had to the Cause; but the Consideration as to the Attendance of Witnesses is very different. They

(a) 1 H. Black. 636.

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are entitled to Protection only as far as their Presence is necessary for the Interests of others. This Person is a mere Stranger as to the Inquiry before the Commissioners; with no direct Interest to be affected by the Proceeding under this Commission. He must therefore be considered as a Volunteer, attending from Motives of Curiosity. The Distinction of this Case from *Mackins v. Smith* is, first, that this is not a Cause: secondly, that this Person was not called on to attend. He was neither a Party, nor a Person interested. Your Lordship's Observations in *Ex parte King* are applied to the Creditor, considered as Suitor in a Cause.

1813.  
Byne,  
*Ex parte.*

Mr. Wingfield, one of the Commissioners, stated, that they were proceeding to enquire into the Title and Value of the Estate, when the Objection was made, that these Inquiries should not be made in the Presence of Byne; who had filed a Bill, claiming the Estate as his own. The Commissioners therefore informed him, that they could not permit him to hear the Objections of other Persons to the Bankrupt's Title; but would afterwards hear his Objections; that certainly he had not been summoned: but there he was.

#### *The Lord CHANCELLOR.*

It was settled by Lord Kenyon, and that has been since acted upon, that a Person attending Commissioners of Bankruptcy for the Purpose of aiding them in the Administration of Justice in Bankruptcy, are, not upon the Circumstance of having a Summons, but upon Principle and the Nature of the Thing, protected *cuncto, morando & redeundo*. I understood the Commissioners at this very Examination to have been acting under their general Authority to examine the Bankrupt, limited in consequence Protection from Arrest of Persons attending Commissioners of Bankruptcy for the Purpose of aiding them in the Administration of Justice *cuncto, mo-*

*rando & redeundo*, not by having a Summons, but upon Principle, applying to a Witness or Party.

of

## CASES IN CHANCERY.

1813.  
~~  
BYNE,  
*Ex parte.*

of what fell from me: but they did not require my limiting Order to enable them to go on: it was rather a Hint to them to stop. The Consequence is, that any Person, attending them upon that Inquiry, was attending under Circumstances, entitling him to that Protection, which a Witness or Party has. It is very clear, that this Protection does not require a Summons. Suppose a Witness offers to attend without putting the Party to the Expence of a *Subpæna*: if he is actually there, he is in the same State as if attending upon a Summons; as, being there, the Court will not part with him, if his Presence is necessary for the Purposes of Justice.

It is clear upon the Proceedings in this Bankruptcy, that *Byne* is a very material Witness upon this Inquiry; and, if he went, tendering himself for Examination, and the Hearing him in the Character, in which he proposed himself, was merely postponed by the Commissioners; under these Circumstances he is clearly entitled to Protection, and in returning, or going into another Room, &c. The Question is merely upon the Fact. When that is ascertained, the Application of the Principle is clear. I do not consider this Person as attending for the Purpose of establishing any Claim of his own: but, if he was attending to be examined for the Purpose of the Inquiry, to which the Commissioners were confined by my Order, and an Objection arose to his Examination upon his Interest, still, until the Commissioners had overruled that Objection, upon the Point of his Interest, he was entitled to Protection. The Commissioners I understand did not feel, that there was any Objection to receiving the Information he wished to tender: but they very properly thought it right first to hear other Persons in his Absence; and postponed his Examination; not deciding, that he should not be heard.

Let

Let *Bryant* therefore if he pleases, make an Affidavit; which, if I should have left the Hall, may be sent to my House: but, this Question must be decided immediately; and, therefore, if I have not such Affidavit by Five o'Clock, this Person must be discharged.

1813.  
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BYNE,  
*Ex parte.*

A very nice Question might arise upon the Effect of the Want of a Summons, where the Arrest happens *eundo*: but, if the Person without a Summons, goes to discharge that Duty, which the Summons would compel him to discharge, and is actually before the Judicature, 'there tendering his Evidence, the Want of a Summons can never deprive him of the Privilege.

The Bankrupt produced an Affidavit: but it had not been filed; and he referred to *Kinder v. Williams* (*a*). Feb. 22.

Sir Samuel Romilly, in Reply.

The Case of *Kinder v. Williams* was over-ruled in *Ex parte King* (*b*). What *Byne* had to state was most material upon this Inquiry into the Title and Value of this Estate, with a View of ascertaining, whether it was sufficient to satisfy the Bankrupt's Debts. *Byne* attended to state, that he had sold the Estate, and had not been paid for it; that he had therefore a Lien. Is not that a material Fact? This Right to Protection cannot depend on such a Circumstance as whether the Party has or has not a Summons. If a Person, happening to be near the Court, attended voluntarily to give material Evidence in a capital Case, would he not be protected?

(*a*) 4 Terin Rep. 377.

(*b*) 7 Ves. 312.

1813.

~~BYNE,  
*Ex parte.**The Lord Chancellor.*

Whenever an Application is made, either to the *Lord Chancellor*, or a Court of Law, or a Judge at Chambers, upon such a Subject as this, the Rule, by which the Fact is to be examined, is, and must of Necessity be, that the Court must believe the Affidavit, so far as it is not contradicted by the Person, against whose Arrest the Application seeks Relief. That was the Rule, upon which *Lord Thurlow* acted in *Aylet's Case*; discharging him upon what he swore in Court; though not believing a Word of it; leaving them to the Remedy by Indictment; a Course which was successfully pursued in that Instance.

The Facts of this Case I must collect from the Affidavit of *Byne*, from that of *Bryant*, as far as it is material, and from what has been stated to me in Court by one of the Commissioners. The Meeting of the Commissioners was not merely held under an Order of mine; but was in the Exercise of their general Jurisdiction to examine the Bankrupt; which Examination was by my Order, properly or improperly, confined to the *Woldingham Estate*. It is alledged, that this Person is not to be considered as attending under a Summons; and I take it so; that there was no Summons. *Bryant's* Affidavit shews a strong Case, that *Byne* can have no Claim to the Estate: but the Truth of that is not material upon the Point of Discharge. The Question for my Consideration is only, whether upon a Reference to the Commissioners to enquire as to the Title and Value of this Estate it was not for them to consider, how far this Claim affected the Title or Value; and whether a Person, proposing himself for Examination upon those Points, was or was not, to be received by them as a Witness.

Admitting therefore that *Byne* had no Summons, first, is not a Person, duly attending Commissioners of Bankruptcy

ruptcy as a Witness, though without a Summons, entitled to Protection? I will not repeat all the Reasons, upon which I formed an Opinion in a former Case, against which I believe no Authority will be found, that Witnesses, if duly attending Commissioners of Bankruptcy, are entitled to Protection as much as when attending other Tribunals, more properly called Courts of Justice: I mean the Courts of Record in *Westminster Hall*; and my Opinion, to which also there is no Contradiction, is, that a Summons is not necessary.

1813.  
BYNE,  
*Ex parte.*

I do not decide, what would be the Effect of an Arrest, where the Party was proceeding to a Court of Justice; and nothing was done in that Court. It will be Time enough to determine that, when such a Case occurs: but, if a Person, attending without a Summons, tenders himself for Examination, and the Court does not repudiate him as a Witness, but proposes to go into the Examination, and he is waiting for that Purpose, or is conducting himself according to their Pleasure, directing the Manner of the Examination, his Appearance there being merely voluntary, that is not a Ground, entitling another Person to arrest him. Did the Commissioners deal with him as a Person to be examined upon some Point of the Inquiry, referred to them? He positively swears, that they did; that it was proposed, that the Parties should be examined separately; and was so adjudged: and that this Person should not be examined until after the Examination of the other Parties. That is a Decision, that they had accepted him as a Witness. It is not for me, or any other Court, to say, whether it may turn out, that his Examination was, or was not, material. He must be entitled to Protection in order to ascertain that. The Fact is sworn to: in that he is not contradicted; and, if he swears falsely, that must be set right another Way.

1813.

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 BYNG,
Ex parte.

As to the Costs, I do not believe, any Contempt was intended: but a Person, arrested, who ought not to be arrested, is entitled to be discharged at the Expence of the Person, who arrested him. Upon that Ground alone therefore he is entitled to Costs. Let him be discharged with Costs.

Take the Order in these Words; that *Bryant* discharge him; and, if he does not, let the Officer attend me again To-morrow; and I shall then order them both to discharge him (a).

(a) *Ex parte Donlevy*, 7 Vcs. 317.

1813,
Feb. 12, 20.

BOEHM v. DE TASTET.

Defendant in
 Contempt,
 under an Order
 for a Messen-
 ger, putting in
 an Answer, to
 which Excep-
 tions were al-
 lowed, Plain-
 tiff, not having
 accepted Costs,
 may imme-
 diately proceed
 upon the old

THE Bill prayed an Account. On the 10th of November, 1812, an Attachment issued against the Defendant, for Want of an Answer; and on the 16th an Order was made for the Messenger to take the Defendant into Custody. On the 18th, the Defendant filed his Answer; to which Exceptions were taken; and the Master on the 3d of February, reported the Answer to be insufficient in all the Points excepted to. The Plaintiff's Clerk in Court, conceiving that, as the Answer was reported insufficient, a Subpoena for a better Answer was unnecessary, and that the Order of the 16th of November remained in Force, instructed the Messenger to take the Process without Subpœna or Notice for a better Answer: but, if in Custody the Process discharged pending the Reference by Tender of Costs.

In a Case of doubtful Practice farther Time to answer allowed on Terms.

Defendant

Defendant into Custody, which he accordingly did on the 6th of February.

1813.

Boehm

v.

De Tastet.

A Motion was made, that the Defendant may be discharged out of the Custody of the Messenger, with Costs.

Mr. Bell, and Mr. Shadwell, in support of the Motion, contended, that the Caption was irregular: the Process of Contempt could not within the Terms of Lord Keeper Finch's Order (a) be proceeded on, until revived by a Rule

(a) General Order, 1676 :
 " That in all such Cases,
 " where the Defendants are
 " to make farther Answers,
 " the Plaintiff shall not
 " be obliged to serve the
 " Defendant with a Sub-
 " pœna to make a better
 " Answer, but shall only be
 " obliged to give a Rule to
 " make a better Answer, if it
 " can be given in Term
 " Time, or if not, then to
 " give the Defendant's Clerk
 " in Court a Copy of the
 " Order or Report, whereby
 " the Defendant shall be
 " ruled to make such better
 " Answer during the Conti-
 " nuance of the public Seals,
 " before, or after the Term:
 " and if after such Rule or
 " Notice is given, the De-
 " fendant do not in Eight

" Days put in a perfect An-
 " swer, or by Order, or Con-
 " sent of the Clerk on both
 " Sides, obtain a Commis-
 " sion to answer, and there-
 " by return a perfect An-
 " swer at the Return there-
 " of, the Process of Con-
 " tempt shall issue for Want
 " thereof; and in case any
 " former Process of Con-
 " tempt shall have issued
 " against such Defendants
 " for Want of appearing or
 " answering, the Plaintiff
 " may resort back to such
 " Process of Contempt, and
 " proceed thereupon, after
 " such Rule or Notice given
 " as aforesaid, notwithstanding
 " the Costs of such for-
 " mer Process were paid
 " upon the coming in of
 " such insufficient or frivo-

CASES IN CHANCERY.

1813.
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 BOROUGH
 v.
 DE TASTER.

Rule or Notice; no Subpœna having issued for a better Answer; and the Case of *Bromfield v. Chichester* (*a*) could not be considered an Authority against a General Order of the Court: nor can a Course of erroneous Practice, however long continued, prevail against such Order: *Broomhead v. Smith* (*b*).

Sir Samuel Romilly, Mr. Hart, and Mr. Wilson, for the Plaintiff.

Under these Circumstances, Process of Contempt to a Messenger issued against the Defendant, and an Answer reported insufficient, Notice is not required: but the Plaintiff may according to the present Practice, and the Case in *Peere Williams* (*c*) take up the former Process. The Order relied on, if inconsistent with the Practice, must be rejected as obsolete: but it seems to be confined to the Case of Costs paid and accepted; which would have purged the Contempt. This Plaintiff, not having accepted the Costs, is therefore entitled to take up the Process, where it dropped; and is not obliged for the Purpose of compelling a farther Answer to begin *de novo*.

The Lord Chancellor.

I have taken the Practice to be thus; that where Process of Contempt issues for Want of an Answer, and an

"ious Answer, Plea, or De-
 "murrer; but when the
 "Defendant hath put in a
 "full Answer, such Costs as
 "he had paid for such for-
 "mer Process, shall upon
 "Payment of the rest be
 "deducted and allowed to
 "him." (See Ord. in Ch.
 p. 193, Ed. 1698).

(*a*) 1 Dick. 379.

(*b*) 8 Ves. 357.

(*c*) Anon. 2 P. Will. 481.

See *Child v. Brabson*, 2 Ves. 110. *Bailey v. Bailey*, 11 Ves. 151. *Waters v. Taylor*, 16 Ves. 417. *Coulson v. Graham*, the following Case.

Answer

Answer is put in, the Defendant is then entitled to be discharged from Custody on paying the Costs, or on Tender and Refusal. I had also supposed upon Recollection, that, if the Costs were accepted, and the Answer was reported insufficient, the Plaintiff must begin *de novo*: but, if they were refused, he could go on with the old Process, in some Sense without Notice; as, if the Defendant ha^s not Notice, what the Report is, it is his own Fault. The Court had come to this Conclusion; that it was improper to deprive the Defendant of his personal Liberty, unless the Court would at the Mointent look into the Auswer, and see, whether it was sufficient; which was not the Habit of the Court.

I had no Recollection, that this Order was ever mentioned. I admit the Difficulty I found in the Case of *Broomhead v. Smith* (a) upon a Practice, subsisting against a positive Order, not appearing to have been reversed: but from a Manuscript Book, containing all the written Orders, which was presented by Mr. Dickens to Lord *Loughborough*, who handed it to me, as I shall to my Successor, I can see, that it is impossible for this Court in many Instances to support its present Practice upon the Notion, that a continued Practice does not nullify a written Order; that involving certainly a serious Question.

Effect of con-
tinued Practice
against an
Order of Court.

With the View to a right Decision upon this Point I consulted the Registers; and also inquired from the Officer, executing the Process, what was the Practice on his Part. His Answer was, that he could not discharge the Defendant without personally knowing, whether he had paid, or tendered, the Costs. That Circumstance, that the actual Practice of the Messenger is different according to the Fact, whether the Costs are paid, or not, is very

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(a) 8 Ves. 357.

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striking;

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striking ; and requires great Attention ; as, unless that Distinction is correct, there is false Imprisonment in every Instance. If the Report of Insufficiency, not excepted to, is a Ground for reviving the Process, how can the Defendant be ignorant, what the Report is ? It is his own Fault, if he will not attend, when the Master settles his Report.

Upon these Grounds I have decided according to the Case, cited from *Peere Williams (a)*, that, if the Plaintiff insists, that the Answer is insufficient, the Court says, that is to be tried in the Master's Office ; and the Defendant, paying or tendering the Costs, shall not be deprived of his Liberty, while that is under Consideration : but the Moment that turns out no longer to be a Subject of Consideration, there is no Reason, why he should not be in Custody. I have frequently ruled the Process, as it is now stated, to be regular ; certainly without any Knowledge of this Order : but much of modern Practice will, I fear, be found inconsistent with subsisting Orders, without any Contradiction of them by subsequent Orders ; and upon Principle repeated Decisions, forming a Series of Practice, as it must be, against an Order, may with Safety be taken to amount to a Reversal of that Order.

Repeated Decisions, forming a Series of Practice, may amount to the Reversal of an Order.

My Opinion therefore is, that this Process is regular.

Feb. 20.

*The Lord CHANCELLOR* said, that upon Consideration and Communication with those, who were most competent to correct any Error on this Subject, his Opinion, that this Practice was regular, continued : but in such a Case, a fair Opinion having been held the other Way, it

2 P. Will. 481.

would

would not be unreasonable to allow a short Time upon the Terms imposed in the Case of *Pigott v. Stacie*, produced from the *Register's Book*: requiring an Affidavit, that the Defendant did not intentionally put in an insufficient Answer.

An Affidavit having been afterwards produced, stating, that the Schedules to be annexed to the Answer were very long and complicated, the *Lord Chancellor* made an Order, giving the Defendant a Fortnight upon the Terms in *Pigott v. Stacie* (a).

(a) *Pigott v. Stacie*, 14 June, 1775. Reg. Lib. B. 1774, fo. 296.

Application on the Part of a Defendant to be discharged out of the Custody of the Messenger, upon a *Cepi Corpus*, after an insufficient Answer, for Irregularity, upon the Ground, that the Plaintiff had not served him with a Subpœna to make a better Answer.

"Upon opening, &c. to "L. C. by Mr. Madocks and "Mr. Hollist, of Counsel "with the Defendant *John Stacie*, it was alledged, "that by an Order of the "27th Day of *May* last, "(suggesting, that, the Defendant *John Stacie* being "in Contempt for Want of "his Answer to the Plaintiff's Bill, an Attachment "issued against him direct-

"ed to the Sheriff of *Mid-  
dlesex*, who returned a *Cepi  
Corpus* thereon), it was ordered, that the Messenger, attending this Court, should apprehend the said Defendant, and bring him to the Bar of this Court, to answer his said Contempt, whereupon such farther Order should be made as should be just; that the said *John Stacie* apprehends, the Plaintiff was irregular in applying for the said Order, for that the said Defendant *John Stacie's* Answer was reported insufficient; yet the Plaintiff should have served him with a Subpœna to make a better Answer, which he hath not done; and therefore it was prayed, that the said Order might be discharged for Irregularity;

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" rity ; and that the said Defendant *John Stacie* might be discharged out of Custody of the Messenger ; or that it might be referred to one of the Masters of this Court to certify, whether the said Order was obtained regularly, or not : whereupon, and upon hearing of Mr. Attorney-General and Mr. Solicitor-General and Mr. Selwyn of Counsel for the Plaintiff, and of what was alledged by the Counsel for the said Parties, his Lordship doth order, that upon the Defendant *John Stacie's* entering his Appearance with the Register by his Clerk in Court in Four Days, consenting that the Serjeant at Arms, attending this Court, shall go, and take the said Defendant into his Custody, as on a Commission of Rebellion returned non est inventus, in case he doth not put in his Answer by the Time hereinafter mentioned, the said Defendant *John Stacie* be discharged out of Custody of the Messenger as to his said Contempt ; and that the said Defendant have a

" Month's Time to put in his farther Answer."

*Pigott v. Stacie*, 6th July, 1775. Reg. Lib. B. 1774, fo. 411.

After the Order of the 14th June, the Plaintiff (upon the usual Allegations) obtained an Order to amend his Bill, and that the Defendant should answer the Amendments and Exceptions at the same Time ; upon which the Defendant by Petition to the *Lord Chancellor* obtained the following Order :

" That upon the said Defendant undertaking to ask no farther Time, and upon his consenting, that the Serjeant at Arms should go against him, as on a Commission of Rebellion returned non est inventus, in case he did not put in his Answer by the Time thereafter mentioned, the Defendant should have a Month's farther Time to put in his farther Answer to the said Exceptions from the Expiration of the said former Order, and that in the mean Time all Proceedings by the Serjeant at Arms for Want of the said Defendant's Answer should be stayed."

COULSON

## COULSON v. GRAHAM.

**I**N this Cause, a Question, was made similar to that raised in *Boehm v. De Tastet* (*a*).

Mr. Leach, and Mr. Wingfield, for the Plaintiff; Mr. Agar, for the Defendant.

*The Lord Chancellor*, referring to his Judgment in that Case, repeated his Opinion, that, after the Master if he has not reported the Answer insufficient, the Plaintiff may go on upon his old Process of Contempt without any new Order, if he has not accepted Costs from the Defendant.

(*a*) The preceding Case.

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INN HALL,  
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After Answer, reported insufficient, Plaintiff may proceed upon his old Process of Contempt without

a new Order,

if he has not

accepted Costs.

## ROWE v. GUDGEON.

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LINCOLN'S  
INN HALL,  
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**T**HE Defendant moved, that the Master might be directed to specify, what particular Exceptions, taken to the several Answers, he had allowed, and what he had over-ruled; in order that the Defendant might apply his additional Answer specifically to the Exceptions, that were allowed.

Mr. Hall, in support of the Motion.

The Practice in the Master's Office to report an Answer insufficient generally upon establishing one Exception, without entering into more, corrected.

In the Case of Exceptions, taken in the first Instance to an Answer, the Master reports on each Exception specially;

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cially; precisely distinguishing, which Exceptions he allows, and which he over-rules: but if the Answer is again referred to him, he satisfies himself, however numerous the Exceptions are, with reporting generally, that the Answer is insufficient. This Practice requires Alteration; the Defendant being incapable of ascertaining the Nature of the Master's Objections.

Mr. Bell, for the Plaintiff, resisted the Motion, as at Variance with the Practice; and observed, that the Circumstances of the Case, shewing the most studied Delay in the Defendant, would induce the Court not to depart from the strict Rule in this Instance.

The Lord Chancellor.

I am aware, that the Practice of the Master's Office is, that, where Exceptions are taken to an Answer, in this Stage the Master deals with them, as they do with Indictments at the *Old Bailey*: if the first holds, not going into any of the others: perhaps Eighty or Ninety in Number; as, if the Prisoner is convicted capitally upon one Indictment, they consider it unnecessary to go into any other. That cannot be right. The Party may appeal to the Court; and, if this Practice of the Master is correct, it is equally right for the Court to look no further than the first Exception, that is established. They may then go to the *House of Lords*; who must either go through all the Exceptions; giving an original Judgment upon all the rest; or must follow the same Course; confining their Judgment to the first. Has not the Party a right to have a Judgment upon each Exception? There is no consistent Practice upon this; as I found by Inquiry on a former Occasion.

Considerable

Considerable Difficulty occurs upon this particular Case; as it is now represented, that I over-ruled the Exceptions; and the Defendant asked Time; which has expired. I doubt, whether I did right in that: this being the first Instance of this Practice of the Office coming before the Court; and it would have been enough to have stated, that the Master had not heard the other Exceptions. If that had been mentioned, I would have sent it back; as it is not for me to decide upon an Exception, upon which the Master has not given his Judgment; nor for the *House of Lords*; until it has been decided both by the Master and this Court. It is impossible, that this Practice can be right; that a Defendant is to fail in his Endeavours to answer several Exceptions, because he has failed in answering one. I should feel a Difficulty in ordering the Master to specify what Exceptions he has allowed, when it is stated, that he has not heard more than one: but my Opinion is, that the Suitor has a right to the Master's Judgment upon each of the Exceptions.

I wish to communicate that to the Master; and will speak to him upon this particular Case.

The Lord CH'ANCELLOR said, he had talked with Mr. Cox; who agreed, that on the Discussion of the Exceptions the Master's Judgment ought to be given on each; and, if the Bill and Answer were sent to him, he would point out his Opinion on each without any Order.

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SLINGSBY

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INN HALL,
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Sheriff levying upon Goods, alledged to be in Settlement, cannot maintain a Bill of Interpleader.

SLINGSBY v. BOULTON.

IN 1812 the Plaintiff, being Sheriff of Yorkshire, received a Writ of *Fieri Facias* upon a Judgment, obtained by the Defendant *Boulton* against the other Defendant, indorsed for £446. The Plaintiff levied; but receiving Notice, and a Copy of a Settlement of Part of the Goods, he made no Return: but afterwards paid in £329 : 2s. being the Residue of the Levy after deducting the Sum paid to the Trustees of the Settlement; who brought an Action of Trover against the Plaintiff for the Goods in Settlement; and, the Defendant *Boulton* also claiming, the Plaintiff filed a Bill of Interpleader; offering to bring the Money into Court, if the Court should be of Opinion, that under the Circumstances he ought to do so; and moved for an Injunction.

Mr. Barber, for the Motion, admitted, that this was a Bill of Interpleader without bringing the Money into Court; but insisted, that under the Circumstances of the Case it was not necessary.

Mr. Johnson, for the Defendant, resisted the Motion, on the Ground, that the Interposition of this Court to compel Defendants to interplead could not be obtained, when the Fund was not deposited.

The Lord CHANCELLOR.

Plaintiff in a Bill of Interpleader admits a Title against himself in all the Defendants; and cannot say, that as to some he is a wrong-doer.

the Defendants. A Person cannot file a Bill of Interpleader, who is obliged to put his Case upon this, that as to some of the Defendants he is a wrong-doer.

No Order was made.

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CORBETT v. CORBETT.

AFTER a Decree, directing the Plaintiff to bring an Ejectment at the next Spring Assizes for the County of Salop, a Motion was made, that the Plaintiff might be at Liberty to read the Depositions of the Defendant's Witnesses, taken in this Court in a Cause of *Corbett v. Corbett*, instituted in the Year 1791, and also the Depositions of the Plaintiff's Witnesses, taken in this Cause, at the Trial of the Ejectment, directed by the Decree, in case such Witnesses, or any, or either, of them shall be dead at the Time of the Trial, or shall be proved at such Trial to be in such a State of Health as not to be capable of attending the said Trial.

Mr. Newland, for the Motion, stated, that many of the Witnesses were very old and infirm; and it would be impossible for several of them but at the Hazard of their Lives to attempt attending the Trial; and mentioned the Case of *Palmer v. Lord Aylesbury* (a).

(a) 15 Ves. 299.

dead, or unable to attend: such Order, whether to be made in Equity, or left to the Judge at Law, depending on a sound Discretion.

Mr.

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March 3.11.12.
Order to read
on a Trial, di-
rected at Law,
Depositions of
Witnesses,
proved by Af-
fidavit from
Age and In-
firmity inca-
pable of at-
tending with-
out great
Danger of
Death, with
Liberty to ex-
amine them on
Interrogatories,
and the Depo-
sitions of such
other Persons
as should be
proved at the
Trial to be

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Mr. Benyon, against the Motion, objected that, there was no Affidavit.

Mr. Wilson (*Amicus Curiae*) mentioned the late Case of *Andrews v. Palmer* (a).

The Lord CHANCELLOR.

Witness being proved unable to attend a Trial, ancillary to a Suit in Equity, the Depositions may be read without an Order; but not without producing the Bill, Answer, and all Proceedings.

There is a great Mistake upon this Subject of reading Depositions at Law. The Interposition of this Court is not from absolute Necessity: if the Depositions are taken in a Cause between the same Parties, and Proof is given at the Trial, that the Witnesses are unable to attend, the Depositions may be read without an Order: but then the Party must incur the Expence and Trouble of having the Bill, Answer, and all the Proceedings. To prevent that Inconvenience therefore, where the Trial is ancillary to a Suit here, an Order of this Court is obtained, directing the Judge at *Nisi Prius* to receive the Deposition without more Proof than that it is the Deposition. In the Case of *Palmer v. Lord Aylesbury* I had some Ground for concluding, that the Witnesses were unable to attend: but it would be very dangerous to make such an Order without some Foundation laid.

Feb. 15.

March 3.

The Motion, being refused, with Liberty to apply again on Affidavit, was renewed in this Form: that the Plaintiff might be at Liberty to read the Pleadings, Proceedings, and the Depositions of the Defendant's Witnesses taken in this Court in a Cause of *Corbett v. Corbett*, instituted in 1791, and also the Depositions of *Rebecca Roberts*, Wife of *Morris Roberts*, aged Seventy-five, and of *Mary Mitton*, Wife of *Thomas Mitton*,

(a) *ante*, 21.

aged

aged Eighty-one, and upwards, and of such other of the Plaintiff's Witnesses, taken in this Cause, at the Trial of an Ejectment brought by the Plaintiff, pursuant to the Decree made, &c. as shall be dead at the Time of such Trial, or shall be proved at the Trial to be in such a State of Health as not to be capable of attending it.

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In support of this Motion an Affidavit was read of a Physician and a Surgeon; stating, that *Rebecca Roberts* was not fit to travel; having an internal Complaint, that would endanger her Life: but with respect to *Mary Mitton* the only Evidence produced was the Affidavit of a Clergyman, stating her great Age, and infirm State.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Newland*, in support of the Motion.

Mr. *Benyon*, for the Defendant..

In the Case of *Palmer v. Lord Aylesbury* (*a*), the Precedent, upon which this Application is made, your Lordship did not mean to compel the Court of Law to read Evidence, which they would have considered inadmissible; but in that particular Case, to save the Expence of taking down the Record, permitted the Deposition to be read. That single Case of Exception will not induce the Court to direct this Ejectment to be tried by a new Rule of Evidence; and without a peremptory Order the Court of Law will not hear these Depositions; the Witnesses being alive. The Rule is laid down by Mr. *Peake* (*b*), taken from *Buller's Nisi Prius*, that, when it is proved, that the Witness is dead, or cannot be found, or, as has been said in *Buller*, has fallen sick by the Way, the Deposition ought to be admitted. Mr. *Peake* observes, that the

(*a*) 15 Vcs. 299.

(*b*) *Peake's Evidence.*

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Circumstance last mentioned, though a good Ground for postponing the Trial, can hardly make the Deposition Evidence. If the Witness is alive, though bed-ridden, a Court of Law will not permit the Deposition to be read, nor the Hand-writing of an attesting Witness to be proved: the general Rule, that, if living, he must be produced, admitting Exceptions certainly; as in the Instance of a Man transported: but this Court, in those excepted Cases preventing the Necessity of carrying down the Record, did not mean to relax the Rule of Law. The Order, as it appears to have been drawn up in *Palmer v. Lord Aylesbury*, is too extensive; and your Lordship will pause in making a new Rule of Evidence upon a purely legal Question: the Object of this Bill being merely to remove a Term for the Purpose of trying an Ejectment; not to have an Issue directed; which might admit greater Latitude. This is no more than a Case of Illness; which the Rule of Law does not provide for; and one Physician swears, that by easy Journeys, and with Care, the Witness may be taken to Shrewsbury. The Order therefore must be confined to the Depositions of Witnesses, who are dead; or perhaps leaving the Question, what Depositions shall be read, to the Discretion of the Court of Law.

Sir Samuel Romilly, in Reply.

If the Rule of Law is, as it is represented, with regard to Persons absolutely incapable from Illness of attending, that, their Depositions cannot be read, as they may be capable of attending at some future Time, a Court of Equity ought to order the Deposition to be received as Evidence; as the Court, assuming the Jurisdiction, must take Care, that the Case shall be properly tried. There is no Rule, requiring Proof at the Trial of the Incapacity to attend; which would create the Expence of taking down Professional

Professional Men, to be examined for that Purpose. Upon the same Principle of saving Expence, on which the Court interposes to prevent taking down the Record, it will, if satisfied, that the Witness is not capable of attending, or likely to be in that State, order the Deposition to be read: no Law compelling the gratuitous Attendance of a Witness for a Pauper. This Fact of Capacity would be decided, not by the Jury, but by the Judge; and this Court is equally competent upon these Affidavits to try the Question, whether this Witness can be safely taken down, or whether it will endanger her Life. The Practice of this Court to order Depositions of Witnesses dead, or unable to attend the Trial, to be read, was settled as long ago as the Time of *Charles II.*: *Bellingham v Pearson* (*a*), a Trial of the Custom of a Manor; and there is no Distinction in this Respect between an Issue and an Ejectment. In *Andrews v. Palmer* (*b*) the Complaint was of a temporary Nature.

The Lord Chancellor.

In the Case of *Palmer v. Lord Aylesbury*, I believe, the Order was, that the Depositions of such Witnesses

(*a*) " *Bellingham v. Pearson*, 3d February, 1667. " Reg. Lib. A. folio 309.

" Issue, directing the Parties to proceed to a Trial at Law upon the Custom, charged in the Bill; and if the Parties differ upon the Issue, then Sir John Cole, one of the Masters of this Court, to settle the same: and after the Trial had, the Equity of the Cause was reserved to be farther determined by the

Court; and after the Trial had this Court will consider of Costs as there shall be Cause: and at such Trial either of the Parties may make Use of the Depositions of such Witnesses taken in this Cause, as shall be then dead, or cannot attend the said Trial." A similar Order was made in *Wray v. May*, at the Rolls, December, 1812.

(*b*) *Ante*, 21.

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should be read as were proved at the Trial unable to attend (a). The Questions are, first, whether, supposing the Rule of Law to be such as it is represented, this Court takes away the Power of deciding, that, the Witness not being dead, his Evidence shall not be read: secondly, in what Terms this Court calls upon the Court of Law to permit the Deposition to be read: if in the Terms I have stated, confined to those, who should be proved at the Trial unable to attend, the Court does not, I believe, make the Order in such Terms, unless satisfied, that even at the Time of the Application there is a Probability, that such Proof will be given at the Trial.

I will make Inquiry as to the Rule at Law. If it is, that, unless the Witness is proved to be actually dead, the Deposition cannot be read, it would become this Court to consider, before it relaxed that Rule; and I should have found it very difficult to decide for admitting the Deposition of a Witness, who had fallen sick by the Way, according to the Passage in *Buller*, but that the Deposition of one, who was so ill as not to be able to set out, could not be received. It is very difficult to admit that Distinction. The Departure from the Rule of Law ought to be as small as possible; and upon an Application of this Kind the Illness ought to be such as to raise an Apprehension, that the Witness may be dead before the Trial. A Rule, that the Evidence should be received at the Trial without Examination into the State of the Witness, would not be wholesome; as though there might be no Hope of producing him in a Week, he might very probably be produced in a Fortnight. If a Court of Equity can go so far, and I believe it has frequently, as to direct, that upon a Proceeding at Law, which is a Part of its Proceedings, the Deposition of a Witness, who

(a) That was the Course taken in *Andrews v. Palmer*, *Ante*, 21.

cannot

cannot attend, shall be read, though without such Direction it could not be read at Law, it must depend upon a sound Discretion in each Instance, how far the Court is to depart from the strict Rule of Law; and though it would order in each Case an Examination before the Judge, whether the Witness could attend, the Consideration is very different as to acting upon that in a Case, where it is physically possible, that he may recover, and where there is no Hope of Recovery; as in the Instance of a Person of this Age; between whom and a Person of the Age of Forty, afflicted with the same Disorder, there is a wide Distinction. I apprehend, no Difficulty will be found in producing a vast Number of Instances of this Order to receive Depositions, modified upon sound Discretion: whether the Question, that the Evidence shall be received, is to be determined upon the Application here, or left to the Court of Law, must depend upon the Circumstances in each Case. In that Case of *Palmer v. Lord Aylesbury*, which had been long in Court, there was nothing, from which the Court had the Means of collecting absolutely, whether the Witness could attend.

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v.  
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### *The Lord CHANCELLOR.*

I am satisfied, that from a very distant Period the Course upon a Trial, or Issue, for establishing some Fact, to aid this Court in the Exercise of its Jurisdiction, has been to direct the Depositions to be read, if the Witnesses are unable to attend; and then it seems to me, though no Precedent has been produced, that it is perfectly absurd, when I am satisfied by the Affidavits, that the Examination with regard to the Ability or Inability to attend can have but one Conclusion, to impose upon the Party the Necessity of trying that Fact before the Judge below; who would try it, and not the Jury. Some of the Orders for reading the Depositions of Witnesses, who shall be proved unable to attend, have not the

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Words, "at the Trial." It is a strong Proposition, that a Person may attend, who is carried down with that extreme Care, that the least Omission may occasion Death; and the Affidavits satisfy me, that these Two Persons by Removal to Shrewsbury would incur a considerable Risk of Death. It is therefore proper to make the Order, that these Depositions shall be read: but I shall accompany that with a Direction, that, if the Defendant chooses to examine them upon Interrogatories in the mean Time, he shall be at Liberty to do so. The great Defect of this Course is, that the Party loses the Benefit of an Examination *vivâ voce*: and Examination upon Interrogatories comes nearest to it.

With that Qualification the Order was made, that the Depositions of these Two Witnesses should be read, and of such other Persons as should be proved at the Trial to be dead, or unable to attend.

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 INN HALL.
 Feb. 26.

The Rule,
 that on a
 written Under-
 taking to pay
 Money on a
 Day certain,
 or on Demand, Interest shall run from the Day, or Demand, without a Contract for it, not extended to the Case of a Surplus in Bankruptcy. Interest therefore subsequent to the Commission confined to Debts, carrying Interest by the Contract.

KOCH, *Ex parte.*

THIS Petition, presented by Creditors, who had proved Debts under a Commission of Bankruptcy against the Exeter Bank, stated, that the Bankrupts were at the Time of their Bankruptcy indebted to the Petitioners and other Persons on Bills of Exchange and

Promisory

Promisory Notes, respectively carrying Interest : some of the Promisory Notes being drawn by the Bankrupts, payable at certain Days after Date, or Sight (*a*), and others for £5, and £1 each, payable to the Bearers, on Demand.

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Koch,
Ex parte.

The Creditors having been paid Twenty Shillings in the Pound on their Debts, with Interest upon such as carried Interest to the Date of the Commission, and the Assignees having in their Hands a considerable Surplus, the Petition prayed, that the Petitioners, and the other Creditors under the Commission, whose Debts carried Interest, may be declared to be entitled to Interest accrued subsequent to the Commission ; that it may be referred to the Commissioners to take an Account of all the Debts proved, carrying Interest ; and that the Assignees may be directed out of the Surplus of the Bankrupts' Effects to pay such Interest.

Mr. Courtenay, in support of the Petition, contended upon the late Case of *Lowndes v. Collens* (*b*), that a Contract to pay Money on Demand carries Interest from the Time of the Demand, whether that Contract is contained in a Promisory Note, or any other Instrument ; that the Bankruptcy was equivalent to a Demand, and conse-

(*a*) These Notes, which are usual with Country Bankers, were in the following Form :

"Twenty-one Days after
"Sight I promise to pay
"A. B. or Bearer Ten Pounds
"with Interest until Accept-
"ance."

As to the legal Import and Effect of such an Instrument, which seem to in-

volve Questions of considerable Difficulty, see the Observations of the Lord Chancellor, 15 Ves. 499, *Ex parte Leman*. The only Instance, in which such a Note appears to have been before a Court of Law, is *Holmes v. Kerrison*, 2 Taut.

323.

(*b*) 17 Ves. 27.

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Ex parte.

quently Interest was due on the Notes subsequent to the Bankruptcy: none of the Instances, in which Interest was refused, applying to the Case of a solvent Estate.

Sir *Samuel Romilly*, and Mr. *Cooke*, for the Bankrupts.

The Consequences of an Order, made on the Ground, that Interest subsequent to the Commission shall be allowed in every Case, where the Law would give Interest, must be very extensive. One obvious Consequence would be, that the Bankrupt would pay more than if he had continued solvent; in which Case many of these Notes would have remained in Circulation without any Demand for many Years. The Novelty of such a Proceeding forms a strong Objection to it; and the Effect is an Alteration of the Practice, settled by Lord *Hardwicke*, that Interest shall not be calculated on a Debt, which does not by Contract carry Interest at the Time of the Bankruptcy (*a*): a Rule which has never been departed from. Though at Law Interest is frequently given for the Detention of a Debt, it is always in the Shape of Damages; which cannot be proved as a Debt; *Marlar, Ex parte* (*b*). In the Case of *Bromley v. Goodere* (*c*) the Master was directed to compute Interest on the Notes carrying Interest upon the Face of them; whence is to be inferred, that there were Notes, that did not carry In-

(*a*) In addition to the Cases cited in the subsequent Part of the Argument, see *Morris, Ex parte*, 3 Bro. C. C. 79. *Champion, Ex parte*, 3 Bro. C. C. 436. *Hankey, Ex parte*, 3 Bro. C. C. 504, and *Mills, Ex parte*, 2 Ves. jun.

295. *Clark, Ex parte*, 4 Ves. 677. *Boardman, Ex parte*, 1 Cooke, B. L. 184. *Reeve, Ex parte*, 9 Ves. 588.

(*b*) 1 Atk. 150. See also *Craven v. Tickell*, 1 Ves. jun. 63.

(*c*) 1 Atk. 75.

terest.

terest. In *Ex parte Rooke* (a), upon the Rule now set up Interest ought to have been calculated from the Time, not of the Report, but of the Bankruptcy. The Case of *Lowndes v. Collens* cannot be applied to a Surplus in Bankruptcy.

1813.
~~
Koch
Ex parte.

Mr. Courtenay, in Reply, admitting, that the Cases cited establish, that Interest shall not be calculated, where the Contract does not expressly provide for it, observed, that they proceeded upon the Uncertainty, what Interest might be due at the Time of the Bankruptcy: but the Course is now different: and the same Rule, which the Courts of Law and Equity adopt generally with regard to Interest, must prevail in Bankruptcy. The Interest in these Cases is due, not as Damages, but as a component Part of the Debt.

The Lord CHANCELLOR.

If there is any Contract for Interest, the Debt will carry Interest: but I have always understood the Rule in Bankruptcy, that Debts, carrying Interest, and no others, are in the Case of a Surplus, to have Interest subsequent to the Commission. It is very difficult to say, upon what Ground originally in Bankruptcy Debts, carrying Interest, were to have it out of the Surplus: as the Debt to be proved is the Principal and Interest due at the Date of the Commission; and the Principle of the Bankrupt Law is to pay the Debts proved, and nothing afterwards. The Court however has gone so far as to give subsequent Interest out of the Surplus with regard to Debts, carrying Interest by the Contract; which is the Expression of all these Orders. Damages are not Interest; and in the Cases at Law it has been considered as ascertained Damages; not as Interest, due by the Contract. It is

(a) 1 *Atk.* 244.

better

1813.
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Koch,
Ex parte.

better to abide by the Rule, that has hitherto prevailed in this Case of a Surplus, than to introduce a new one; the Consequences of which it is not easy to foresee.

Take the Order in the same Words as in the Case of Sir Stephen Evance (*a*), to compute Interest upon such Debts only as by the Contract carry Interest.

(*a*) *Bromley v. Goodere*, 1 *Atk.* 75.

1813.
LINCOLN'S
INN HALL.
Feb. 5.

Joint Creditors having taken out a separate Commission of Bankruptcy, proving, and voting in the Choice of Assignees, may afterwards join the Bankrupt in an Action as a Co-Defendant, upon giving a full Indemnity, undertaking to take no Advantage of the Verdict or Judgment against him, with Costs of the Petition.

READ, *Ex parte.*

A COMMISSION of Bankruptcy issued against the Petitioner in August, 1811, upon the Petition of Matthias Attwood, a joint Creditor of the Bankrupt, and John Lea and Jonathan Corrie, upon their joint Promissory Note for £3500; which Debt he proved under the Commission; having no other Demand against the Bankrupt; and voted in the Choice of Assignees (*a*). In January, 1813, Attwood commenced an Action upon the Note against the Bankrupt jointly with Lea and Corrie.

The Petition prayed, that all Proceedings at Law in the Action, so far as regards the Bankrupt, might be stayed (*b*), and that Attwood may pay the Costs at Law, and of this Application. A Motion was made in the Court of Common Pleas, that a *Noli Prosegui* should be entered as against the Bankrupt; but that Court declined interfering.

(*a*) *Ex parte Ackerman*, (*b*) Sec 49 Geo. 3.c. 121.
14 Ves. 604. *Ex parte De s.* 14.
Tastet, 17 Ves. 247.

Sir

Sir Samuel Romilly, in support of the Petition.

1813.

—READ,
Ex parte.

Mr. Parker, for Lea. Mr. Benyon, for Corrie.

Mr. Heald, for Atwood, stated, that the Bankrupt was a necessary, though a formal, Party; and, had the Plaintiff proceeded without joining him, the Defendants might have pleaded in Abatement; offering to indemnify the Bankrupt.

The Lord CHANCELLOR.

This Creditor's Proof under the Commission is an Election not to take any other Proceeding, meant to be effectual against the Bankrupt; but where it is necessary to join him in an Action for the Purpose of sustaining the Plaintiff's Right against other Parties, the Bankrupt is entitled both under the last Act of Parliament (*a*) and the Law, as it stood previously, to a full Indemnity, before the Plaintiff can proceed at Law.

The Order must be, that the Plaintiff at Law shall indemnify the Bankrupt against all the Expences of the Action, to whatever Point it may be carried, and shall not take Advantage of the Verdict or Judgment as against him; and the Plaintiff must pay the Costs of this Petition.

(*a*) Stat. 49 Geo. 3. c. 121.

TRIGWELL,

1813.

March 17.

Commission
of Bankruptcy
superseded on
Consent of the
petitioning
Creditor.

THIS Petition prayed, that a Commission of Bankruptcy, which had not been opened, might be superseded, with the Consent of the petitioning Creditor.

Mr. Montague, referring to *Ex parte Lanchester* (*a*) said, that though the *Lord Chancellor* would not stay the Proceedings without the Consent of the petitioning Creditor (*b*), with that Consent there could be no Objection.

Mr. Heald, for the petitioning Creditor, expressed his Consent.

The Lord CHANCELLOR made the Order.

(*a*) 17 Ves. 512.

(*b*) Though the *Lord Chancellor* will not stay the Declaration of Bankruptcy, to which the Creditor is entitled under the Act of Parliament upon the Proof before the Commissioners, his Lordship will, upon Affidavit, denying the Act of Bankruptcy, or Debt, stay the Insertion in the *Gazette*, until the Proceedings are

laid before him; and Applications for that Purpose are becoming frequent: See *Ex parte Fletcher, Post*, 350.

Where the petitioning Creditor Consents, it seems proper, that the Ground of his Consent should be stated, with reference to the Statute 5 Geo. 2. c. 30. s. 24. See *Ex parte Browne*, 15 Ves. 472.

1813.

LINCOLN'S
INN HALL.
March 11.

ROSS v. LAUGHTON.

IN 1812 a Decree was made for an Account against an Executor, with the usual Direction to produce all Papers, &c.

The Defendant having since become Bankrupt, his Assignees were incapable of proving his Discharge in the Master's Office, without certain Vouchers, which were in the Progress of the Cause previously to the Bankruptcy deposited by the Bankrupt with his Solicitor; whom the Assignees had not continued to employ. On the Part of the Assignee a Motion was made, that the Defendant, or his Solicitor, might produce, and shew to the Master, all such Vouchers, &c., in their Possession or Power, relating to Payments made by the Defendant, on account of the Estate of the Testator.

Mr. Agar, in support of the Motion.

Mr. Parker, for the Defendant's Solicitor, resisted the Motion, on the Ground, that the Assignees had not offered to pay his Bill.

The Lord Chancellor made the Order; observing, that there was no Case, in which a Solicitor, receiving from his Client Papers in the Course of a Cause for the Purpose of doing Justice to such Client, had been suffered to refuse to produce them in that Cause; that this was an Application, not by the Client himself, but by those, cloathed with his Interest; and the Circumstance, that the Assignees had not employed the Solicitor, could make no Difference;

Solicitor bound to produce Papers of his Client for him, or in case of his Bankruptcy for his Assignees, though not employed by them, in the Cause, for the Purposes of which he received them; but not bound without Payment to deliver them up, or produce them in any other Business.

1813.
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 Ross
 v.
 LAUGHTON.

Difference; but though the Solicitor could not refuse to produce Papers, delivered under the Circumstances of this Case, yet he might refuse to part with them, or to leave them in the Master's Office; and the Order, therefore, must be confined to producing the Papers in this Cause; not extending to delivering them over, or to the Production of them in any other Matter.

1813.
 LINCOLN'S
 INN HALL.
 March 16.

FLETCHER, *Ex parte.*

Order under
 Circumstances
 restraining the
 Insertion in the
Gazette of the
 Declaration
 of Bankruptcy,
 until the Pro-
 ceedings should
 be laid before
 the *Lord Chan-
 cellor.*

THE Object of this Petition was to stay the Insertion of the Petitioner's Bankruptcy in the *Gazette*, if the Commissioners should declare him a Bankrupt. The Petition stated, that the Commission was taken out on an Accommodation Bill, accepted by the Petitioner for the Accommodation of the petitioning Creditor; that Two Years had elapsed without any Demand made on the Petitioner; that he had committed no Act of Bankruptcy; was perfectly solvent; and on hearing of the Docket, had offered to deposit the Amount of the Bill. The Petition was supported by Affidavits of the Facts.

Sir *Samuel Romilly*, and Mr. *Wingfield*, in support of the Petition, admitting, that this was an unusual Proceeding, justified it under such Circumstances by the ruinous Consequences, which the Publication of Bankruptcy would produce.

The Lord CHANCELLOR, being informed, that the Commission had not been opened, made an Order, that the Commissioners should proceed to open the Commission, but should not publish the Declaration of Bankruptcy, until his Lordship had inspected the Proceedings.

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The Petition from want of Time not having been regularly presented, his Lordship signed it in Court; and directed the Proceedings to be laid before him immediately upon the Declaration of Bankruptcy (*a*).

1813.
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FLETCHER,
Ex parte.

(*a*) See *Ex parte Foster*, Ca. 49, *Ex parte Lanchester*, 17 Ves. 414, 1 Rose's Bank. 17 Ves. 512.

PATON v. ROGERS.

1813.
LINCOLN'S
INN HALL.
March 19.

THE Bill prayed a specific Performance of a Contract for the Sale of an Estate by Assignees under a Commission of Bankruptcy to the Defendant, and an Injunction against proceeding at Law to recover the Deposit.

Reference of Title before Decree refused, where the Purchaser on other Grounds resists a Performance of the Contract. Though it is generally, not universally, true, that a Purchaser may take what he can get with Compensation for what he cannot have, whether that is ever done without an express Undertaking on his Part to do what the Court shall order,

The Answer set up Objections to the Title; Delay in compleating the Purchase: Deficiency in the Quantity of Land, as stated in the Particular: submitting, that, if a good Title could be made, the Defendant ought not to be compelled specifically to perform a Contract, into which he was led by an incorrect Particular, and Mis-representation; and denying, that the Agreement was fair.

The Injunction being continued after the Answer came in, a Motion was made by the Defendant, that the Plaintiffs may pay into Court the Deposit, paid by the Defendant; and that an Inquiry may be directed, whether the Plaintiffs can

1813.
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PATON
v.
ROGERS.

can make a good Title to the Premises, or to any Part of them; and whether they had a good Title on the Day of their entering into the Contract (*a*), or at the Time of filing the Bill: such Inquiry to be without Prejudice to every Claim, to which the Defendant may be entitled for Compensation.

Mr. Hart, and Mr. Owen, in support of the Motion, mentioned *Balmanno v. Lumley* (*b*).

Sir Samuel Romilly, and Mr. Roupell, for the Plaintiffs.

The Lord Chancellor.

The general Rule is, as I see it stated in *Blyth v. Elmhirst* (*c*), that where the Record raises merely the Question of Title, or, where it is agreed at the Bar, that there is no other Question, the Court will immediately direct a Reference to the Master upon the Title; following the first Decision upon that Point by Lord Rosslyn (*d*): in that Sort of Case both Parties agreeing, that, if there is a good Title, there ought to be a specific Performance; and the Parties supply what stands at the Head of every such Decree, a Declaration, that the Contract ought to be specifically performed; and then a Direction to the Master to look into the Title: but, if the Record furnishes the Question, whether there ought to be a specific Performance, the Court does not give that Reference; as upon

(*a*) That a Vendor, not having a Title at the Date of the Contract, shall have a specific Performance, if he procure a Title before the Report, see *Mortlock v. Bul-*

lcr., 10 *Ves.* 315, *Wynn v. Morgan*, 7 *Ves.* 202.

(*b*) *Ante*, 224.

(*c*) *Ante*, 1

(*d*) *Moss v. Matthews*, 3 *Ves.* 279.

other

bther Circumstances a Question is made, whether, even if there is a good Title, there should be a specific Performance. As to the Question of Compensation (*a*) it is true generally, but not universally, that the Purchaser may take what he can get with Compensation for what he cannot have (*b*); and I doubt, whether that is ever done except, where there is an express Undertaking on his Part to do what the Court shall order; which, perhaps, may distinguish the Case that has been mentioned.

The Deposit was ordered to be paid into Court; and the rest of the Motion was refused.

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| <p>(<i>a</i>) As to Compensation generally, see <i>Calcraft v. Roebuck</i>, 1 <i>Ves.</i> 221, <i>Guest v. Homfray</i>, 5 <i>Ves.</i> 818, <i>Drew v. Hanson</i>, 6 <i>Ves.</i> 675, <i>Drew v. Corp</i>, 9 <i>Ves.</i> 368, <i>Mortlock v. Buller</i>, 10 <i>Ves.</i> 306, <i>Dyer v. Hargrave</i>, 10 <i>Ves.</i> 505, <i>Halsey v. Grant</i>,</p> | <p>13 <i>Ves.</i> 73, <i>Honyblow v. Shirley</i>, 13 <i>Ves.</i> 81, <i>Alley v. Deschamps</i>, 13 <i>Ves.</i> 228, <i>Browne v. Warner</i>, 14 <i>Ves.</i> 413, <i>Milligan v. Cooke</i>, 16 <i>Ves.</i> 1, <i>Todd v. Gee</i>, 17 <i>Ves.</i> 273.</p> |
| | <p>(<i>b</i>) See <i>Mortlock v. Buller</i>, 10 <i>Ves.</i> 316.</p> |

1813.
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PATON  
v.  
ROGERS.

1813.

LINCOLN'S  
INN HALL.  
March 27.

Marriage Settlement of personal Property in general Terms, "all  
 " Monies,  
 " Debts, Bills,  
 " Bonds,  
 " Notes," &c.  
 No Inference of Fraud from the Cancellation, during the Treaty, upon a fair, moral, Consideration, of a Note, the only Instrument of that Description: the Marriage not taking place upon a Representation of the Particulars or Amount.

Discretion of Trustees, having Power to change Securities, but not without Consent, not controled, unless mischievously and ruinously exercised.

## DE MANNEVILLE v. CROMPTON.

THE Bill stated the Marriage of the Plaintiff on the 21st of April, 1800, with Margaret Crompton; and that by the Marriage Settlement, dated the 2d of April, 1800, reciting, that Margaret Crompton was possessed of, or entitled to, a considerable personal Estate, Part whereof was secured to her by "Mortgages, Bonds, Notes, " and other Securities," and that it was proposed, that "all " and singular the said personal Estate of the said Margaret Crompton" should be assigned and vested in the Defendants *Ann Crompton* and *Edmund Haworth* upon the Trusts after mentioned, it was witnessed, that in Consideration of the said intended Marriage, &c. Margaret Crompton with the Consent of the Plaintiff assigned unto *Ann Crompton* and *Haworth* "All and singular the " Monies, Debts, Bills, Bonds, Notes, and other Se- " curities for Money, Chattels real and other Chattels " and personal Estate," of Margaret Crompton, to hold to such Uses, &c. as she should appoint, and for want thereof then for her sole and separate Use; with Limitations over, by which the Husband took a partial, contingent, Interest (*a*); and a Power to the Trustees, but not without the Consent in Writing of Mrs. De Manner- ville, to call in any of the Securities, and make Sale from Time to Time, and to re-invest the Money upon the same Trusts.

The Bill farther stating, that among the Property to which Mrs. De Mannerille was entitled, was a Pro-

(*a*) See *De Mannerille v. De Mannerille*, 10 Ves. 52.

misory Note for £2000 by her Mother *Ann Crompton*, the Trustee, for valuable Consideration, which Note had been cancelled and destroyed either by the Trustees, or Mrs. *De Manneville*, who had ceased to live with her Husband, and that other Property was out upon hazardous Security, prayed an Account of the personal Estate, which *Margaret De Manneville* was interested in or entitled to at the Time of making the Settlement; and that in taking the Account *Ann Crompton* may stand charged with the Sum of £2000, in which she was so indebted to her Daughter, &c.

1813.  
DE MANNEVILLE  
v.  
CROMPTON.

The Answer of the Trustees and Mrs. *De Manneville* represented, that the Note for £2000 was given Seventeen Years ago by Mrs. *Crompton*, without any Consideration, at the Instance of her Brother, as some Provision in case of her second Marriage for her Daughter; whose Fortune at that Time was inconsiderable: but Mrs. *De Manneville* about a Year before her Marriage, whether before or after the Instructions for the Settlement, or while the Marriage was in Contemplation, the Defendants could not recollect, having acquired a large Accession of Fortune, without the Desire or previous Knowledge of her Mother brought the Note, and burnt it before her.

*Mr. Richards, and Mr. Bell, for the Plaintiffs.*

*Sir. Samuel Romilly, and Mr. Agar, for the Defendants.*

#### *The Lord CHANCELLOR.*

This is a Case of Importance in Two Views of it: Material first, I should be very unwilling to relax a Principle, which has long prevailed both at Law and in Equity; that, if a Person, contracting Marriage, made good even at the Instance of Persons concerned in fraudulently defeating such Representation.

1813.

De MANN.  
VILLE  
v.  
CROMPTON.

Representation is made upon the Circumstances of a Person about to form a Connection in Marriage, and that Representation is of such a Nature, that, if not made good, or if varied, it will materially affect the Circumstances in Life of that Party, Courts both of Law and Equity will hold the Party bound to make good that Representation, even at the Suit of Individuals, concerned in fraudulently defeating such a Representation, upon which that Connection was proceeding (*a*). It is however, of equal Importance, that this should not be carried to the Extent, that, whenever any thing occurs in general Treaty, not entering into Particulars, or shewing, that the Marriage actually took place upon such Representation, that Principle is to be applied to a Case, to which it has no Application, and was never intended to be applied.

With these general Observations I come to the Consideration of the Question, whether the Defendant, the Mother of Mrs. De Manneville, is bound to bring into the Fortune of her Daughter a Sum of £2000, represented as due to her from the Mother at the Commencement of the Treaty of Marriage. The Marriage appears to have been in Contemplation from January, 1799, when Instructions were given for the Settlement, to April, 1800, when the Marriage took place. All the personal Property of Mrs. De Manneville was to be included; and the Settlement is an Assignment of that personal Estate to Two Trustees, one of whom is the Mother. Whatever the Parties might have understood, it could hardly have been in the Contemplation of any of the professional Gentlemen consulted, that a Note was to be assigned to the Debtor in that Note, as a Trustee to sue herself. There is no Evidence or Admission, that any

(*a*) *Nettelle v. Wilkinson*, 1 Bro. C. C. 543.

Representation

Representation was ever made to the Plaintiff farther than that it was in Contemplation, that whatever was the real or personal Property of the Lady would be the Subject of Settlement. There was no Representation of what Particulars it consisted, or of the actual Amount: nor is there any Recital, that particular Property should be settled, except the Word "Notes" occurring in the plural Number; and there is no Note, unless this Note for £2000 was intended. When we are fixing Fraud upon a Party, it would be a vast deal too much from the mere Circumstance, that this Word occurs in a general Description of all the personal Estate, without any specific Representation, and that there is no Note found among the Particulars assigned, to infer Fraud. If she had changed her Securities in the Course of the Treaty, and at the Conclusion of it there had been no Bond, but many Notes, the Settlement must have operated upon all the Estate, of which at that Time she was seised and possessed; comprehending all personal Estate, whether falling within any particular Description, or not; whether that Description was, or was not applicable to any one Item. It is therefore too much from the mere Circumstance, that no Note happens to be found among the Particulars of the personal Property, though the Word "Notes" is in the Deed, to take that as a Ground for imputing Fraud: though there was no particular Conversation as to the Nature of any one Security; and the Settlement was prepared upon the Suggestion, that it would be inconvenient to describe or schedule the Particulars; and therefore the Property was to be taken in the gross.

The Representation by the Answer is, that this Note was not given for valuable Consideration, and payable in all Events, but that, Mrs. Crompton being a young Widow, her Brother, considering, that she might marry again, represented to her, that she should make some

1818.

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Dr MANNE-

VILLE

v.

CROMPTON.

1813.

De MANN-  
VILLE

v.  
CROMPTON.

Provision for this Child in the Event of another Marriage; and under that Recommendation this Note was given without Consideration, and only in the Event of another Marriage. That would not vary the Question, if, though payable upon a Contingency, it was Part of the Property, with reference to which the Representation was made. The Contingency would affect its Value: but whatever it was, it would be bound by that Representation.

The Answer farther represents, that Mrs. *De Manneville*, feeling, that she ought not to insist upon it, destroyed this Note: with regard to the Time, it is extremely difficult to say with positive Certainty, when it was destroyed: but if it depended on that, there is sufficient Ground for a judicial Opinion, that it was really given up after *January*, 1799; when Instructions for the Settlement were given; and the true Question is, whether there is sufficient Evidence in the Nature of the Transactions from *January*, 1799, to *April*, 1800, of a Representation, and Assurance, (for it must amount to that), that the personal Estate, as it stood at the Commencement of that Period, whatever its Amount, should in no Way be diminished, if the Marriage should take place. Unless there is clear Evidence of that, the Settlement itself must be the Rule.

Upon that Principle my Opinion is, that the Marriage was not upon any Representation as to the Amount of the Property in *January*, 1799; that it should be in no Way diminished; or that this Note should make Part of the Settlement; and I should go beyond any Precedent by holding, that here was a Representation leading to Marriage, which was either fraudulently or substantially defeated by what took place afterwards with reference to

the

the Note. No Relief is therefore due with regard to the Note.

1813.

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DE MANNE-  
VILLE  
v.  
CROMPTON.

As to the general Ground of the Bill, this is a Case, upon which it is not within the Province of a Court of Equity to interfere; depending upon this. If there are Trustees authorized to lay out Money upon Government or real Securities, or personal Property, the Court in many Instances will say, they shall choose that, which is best. If personal Property is out upon hazardous Securities, which is charged in this Bill, but positively denied, there is no Doubt, that Trustees would be controlled by the Court; and even their Discretion in such a Contract as this, would be controlled, if that Discretion was shewn to be mischievously and ruinously exercised. One Distinction between Courts of Law and Equity is this: the Court of Law has before it the Parties interested: but it is frequently the Interest of all the Parties before a Court of Equity to have a Decree against some one, who is not before the Court. In this Case the Plaintiff's Construction is the safest: but upon the whole of this Deed, containing a Proviso, that the Trustees shall call in any of the Securities, but not without the Consent of Mrs. *De Manneville*, why, settling her own Property on Marriage, may she not stipulate, that they shall not call in Money without her Consent in Writing; and if that is the Contract, what Authority has a Court of Equity to strike it out of the Settlement? That Stipulation therefore being in the Settlement, upon the general Ground the Bill must be dismissed without Costs.

1813.

LINCOLN'S  
INN HALL.  
Feb. 26.

A Farmer, making Lime from a Lime-pit, opened and worked before the Commencement of his Term, and selling the Surplus beyond what he required for Manure, is not a Trader within the Bankrupt Laws.

RIDGE, *Ex parte.*

THIS Petition was presented by a Bankrupt to supersede the Commission, on the Ground, that the Petitioner was not a Trader. The Affidavits in support of the Petition stated, that for upwards of Fifteen Years previous to the Commission the Bankrupt under a Lease occupied a Farm; on which at the Time he entered there was a Lime-pit; which had been opened and worked by former Occupiers; that after he so entered he from Time to Time dug up the Lime-stone, and converted the same into Lime with Materials, purchased by him for that Purpose, using Part of the Lime for the Purpose of manuring his Farm; and disposing of such Quantities of the Lime, so made by him, as were not wanted for the Purposes of his Farm, to other Persons; and that he did not seek his Livelihood by making and selling Lime; nor did he take the Farm for that Purpose; and he did not exercise or carry on any Trade or Business save that of a Farmer.

Mr. Leach, Mr. Cullen, and Mr. Parker, in support of the Petition.

This Case falls within the Principle of *Newton v. Newton* (a). This is not the Case of a Person, taking the Lime Rock for the Purpose of Sale: it is Part of his Farm: he uses the Lime, that is made from it, to manure his Farm; and sells the remainder. The Question, which has been the Subject of much Doubt, whether a mere

(a) 1 Co. Bankrupt Laws, 57. (Ed. 1804)

Lime-burner

Lime-burner is a Trader within the Bankrupt Laws, does not arise here: as this Petitioner is a Farmer selling a surplus Commodity: nor does it make any Difference, that he sells that Surplus to any one indiscriminately.

1813.  
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RIDGE,
Ex parte.

Sir Samuel Romilly, for the petitioning Creditors, admitted, that though this Case never had been decided *in Specie*, it fell within the general Rule; and was not to be distinguished from *Sutton v. Weeley (a)*, and the other Cases on Brick-making and Allum-works.

The Lord CHANCELLOR said, this Case could not be distinguished: and therefore the Commission must be superseded.

The Commission was superseded with Costs.

(a) 7 East. 442.

TREFUSIS v. CLINTON.

1813.
LINCOLN'S
INN HALL.
March 26.

AFTER the Sale of an Estate before the Master the Biddings were opened; and, the Re-sale having produced upwards of £3000 more, a Motion was made by the Person, who had opened the Biddings, for the Return of his Deposit, and a Reference to the Master to tax his Costs, incurred in opening the Biddings, and the Re-sale, and of this Application, and incidental thereto, as between Solicitor and Client, and that, when taxed, such Costs may be directed to be paid by the Purchaser out of the Purchase-money.

A Re-sale on opening Bid-dings pro-duc-ing a con-siderable In-crease of Price no Ground for Costs to the Person, who opened the Biddings.

Sir

CASES IN CHANCERY.

1813.

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TREFUSIS  
v.  
CLINTON.

Sir *Samuel Romilly*, in support of the Motion, observing, that the Return of the Deposit was of course, claimed the Costs on the Ground of the Benefit produced by opening the Biddings.

*Mr. Heald* resisted the Motion.

*The Lord Chancellor*, granting the Motion, so far as it applied to the Return of the Deposit, refused it as to the Costs, as contrary to the Practice (*a*).

(*a*) *Rigby v. M'Namara*, Object of Benefit to the Family, Costs are allowed.  
*6 Ves. 466. Earl Maccles-*  
*field v. Blake*, *8 Ves. 214* ; *Owen v. Foulkes*, *9 Ves. 348.*  
 but where the Biddings have *West v. Vincent*, *12 Ves. 6.*  
 been opened for the express

1813.

LINCOLN'S  
INN HALL.

Feb. 26.

WESTBEECH v. KENNEDY.

In proving the Execution of a Devise actual Signature by the Devisor in the Presence of the Three subscribing Witnesses not required, if he declares it to be his Will before those, who did not see him sign; and separate Attestations sufficient.

IN a Suit, instituted for the Execution of the Trusts of the Will of *Joseph Westbeech*, devising real Estate, a Question arose, whether the Will was duly executed according to the Statute of Frauds (*a*).

*Richard Emmerson*, one of the Three subscribing Witnesses, deposed, that the Testator produced the Will, and "did in the Presence and Hearing of this Deponent seal the same and publish and declare the same as his last Will," *Henry Dimock*, one other of the subscribing Witnesses being present; the Deponent not recollecting with Certainty, whether the Testator and *Henry Dimock*

(*a*) *Stat. 29 Ch. 2. c. 3.*

did

did sign in his Presence ; though he believed their Names subscribed to be of their Hand-writing.

1813.

WESTBEECH

v.

KENNEDY,

*Henry Dimock* deposed, that he saw the Testator duly sign, seal and publish his Will ; that *Richard Emmerson* was present, and that he subscribed his Name in the Presence of this Deponent.

*Henry Boys*, the third subscribing Witness, deposed, that he was sent for to be a Witness to the Will of the Testator : that upon his attending the Testator did produce the Will to "this Deponent, and request him to be "a Witness thereto ; and he the said *Joseph Westbeech* "did also at the same Time seal the said produced Paper-writing, and publish and declare the same as and for his "last Will and Testament in the Presence and Hearing of "him this Deponent : but the said *Joseph Westbeech* did "not sign the same in the Presence of him this Deponent : "such produced Paper-writing appearing to have been "signed by him the said *Joseph Westbeech*, and also by " *Henry Dimock*, and *Richard Emmerson*, whose Names "now appear to be set and subscribed to the said produced Paper-writing, as two of the Witnesses thereto, "prior to this Deponent's attending him the said *Joseph Westbeech*, as aforesaid."

*Boys* also stated, that he believed the Hand-writing subscribed to be the Testator's, having often seen him write ; and that, when he this Deponent subscribed his Name as a Witness, no other Person was present.

Sir *Samuel Romilly*, and Mr. *Parker*, for the Plaintiffs, contended, that it was not necessary, that the Three Witnesses should be together present at the Execution of the Will, nor that they should see the Testator sign, if he recognized

## CASES IN CHANCERY.

1813.  
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 WESTBEECH  
 v.  
 KENNEDY.

recognised the Signature as his; relying on *Lemayne v. Stanley* (a), *Jones v. Lake* (b), *Warneford v. Warneford* (c), *Smith v. Evans* (d), *Dormer v. Thurland* (e), *Grayson v. Atkinson* (f), and *Stonehouse v. Evelyn* (g).

**Mr. Hart, and Mr. Perry, for the Defendants.**

**The Lord CHANCELLOR made the Decree, as prayed.**

|                                                                                                             |                                                                                                                                                                                                                                                                                                                           |
|-------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (a) 3 Lev. 1.                                                                                               | Cook v. Parsons, Prec. Ch.                                                                                                                                                                                                                                                                                                |
| (b) 2 Atk. 176. (in Note)<br>and 2 Ves. 455. S. C.                                                          | 184. Aron. 2 Ch. Ca. 109<br><i>Shires v. Glasecock</i> , Salt. 688.<br><i>Croft v. Pawlet</i> , 2 Stra. 1109.<br><i>Longford v. Eyre</i> , 1 P. Wms. 740. <i>Carleton v. Griffin</i> , 1 Burr. 549. <i>Right v. Price</i> , Doug. 229. <i>Casson v. Dale</i> , 1 Bro. Ch. Ca. 99, and <i>Gryle v. Grylc</i> , 2 Atk. 176. |
| (c) 2 Str. 764.                                                                                             |                                                                                                                                                                                                                                                                                                                           |
| (d) 1 Wils. 313.                                                                                            |                                                                                                                                                                                                                                                                                                                           |
| (e) 2 P. Wms. 509.                                                                                          |                                                                                                                                                                                                                                                                                                                           |
| (f) 2 Ves. 454.                                                                                             |                                                                                                                                                                                                                                                                                                                           |
| (g) 3 P. Wms. 252. See also<br><i>Ellis v. Smith</i> , 1 Ves. jun. 11.<br><i>Addy v. Griz</i> , 8 Ves. 504. |                                                                                                                                                                                                                                                                                                                           |

1813.  
 LINCOLN'S  
 INN HALL,  
 March 4.

Legacy of £50 for a Ring not specific: therefore carrying Interest with other pecuniary Legacies.

**APREECE v. APREECE.**

**SHUCKBURGH** *Ashby Apreece bequeathed unto Robert Farquhar, and his Wife, the Sum of £50 each for a Ring.*

Under the usual Direction to compute Interest on such of the Legacies as carried Interest the Master had not allowed any Interest on these Legacies, considering them in the Nature of specific Bequests, and amounting to the same as if the Testator had bequeathed the Rings themselves.

**A Motion**

A Motion was made for Liberty to except to the Master's Report for not allowing Interest on the Two Legacies.

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APREECE  
v.

APREECE.

Mr. Agar, in support of the Motion, contended, that there was no Ground for considering the Legacies as specific: and therefore Interest must be computed on them.

Mr. Shadwell, for the Defendant, admitted, that he had not discovered any Authority for a Distinction between a Legacy of £50 for a Ring, and a Legacy of £50 simply.

The Lord CHANCELLOR clearly held, that these Legacies were not specific (*a*); and that the Legatees therefore were entitled to Interest within the Terms of the Decree.

(*a*) Most of the Cases on specific Legacies, and the Distinctions upon the Subject will be found in Mr. Cox's Notes to *Hinton v. Pinke*, 1 P. Wms. 539, and *Rider v. Wager*, 2 P. Wms. 328. Mr. Raithby's Note to

*Brown v. Allen*, 1 Vern. 31; Mr. Sanders's Notes to *Purse v. Snaplin*, 1 Atk. 414, and Mr. Fonblanche's Note, 2 Treat. Eq. 369. See also *Gillaume v. Adderley*, 15 Ves. 384, referring to the late Cases.

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LINCOLN's  
INN HALL,  
March 3. 14.

16.

An Answer filed is a sufficient Objection to a Motion to extend an Injunction to stay Trial: but, as the Defendant submitted to Exceptions, the Order was made: an insufficient Answer being no Answer.

## BISHTON v. BIRCH.

THE common Injunction having been obtained, for want of Answer, to stay Proceedings at Law, the Plaintiff moved, that the Injunction might be extended to stay Trial, on Affidavit, that he verily believed he could not with safety proceed to Trial, until the Defendant should have put in his Answer; and that a Discovery would arise out of the Answer, so as to enable him to make a good Defence to the Action.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Fisher*, in support of the Motion.

Mr. *Heald*, for the Defendant, objected, that the Answer had been filed that Morning; and produced the Six-Clerk's Certificate.

Sir *Samuel Romilly*, in Reply, contended, that the Answer, filed since the Notice served, and immediately before the Motion was made, could form no Objection; the Plaintiff not having an Opportunity of seeing, whether it was a sufficient Answer; and that such a Practice, permitting a Defendant to defeat the Motion by an Answer of a few Lines, extremely insufficient, for which there is no Authority, would be attended with great Inconvenience.

*The Lord CHANCELLOR* said, he would inquire into the Practice.

March 14. 16.

Afterwards, before the Motion was decided, several Exceptions were filed; to which the Defendant immediately submitted; and put in a farther Answer.

Upon

Upon these Facts the Motion was renewed; the Plaintiff insisting, that his Right to have the Injunction extended was clear by the Admission.

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~~  
BISHTON  
v.  
BIRCH.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Fisher*, for the Plaintiff, insisted, that it was now put out of all Doubt, that the former Answer was insufficient; and an insufficient Answer is always considered as no Answer.

Mr. *Heald*, for the Defendant, contended, that in determining this Motion the subsequent Circumstances could not be taken into the Consideration.

*The Lord Chancellor* said, that the Court, being informed of the Circumstances relating to the farther Answer, must take Notice of them, and give them their due Weight in deciding upon the Motion to extend the Injunction; that by the Practice of the Court the Fact of an Answer filed was a sufficient Objection to such a Motion: but the Defendant having submitted to Exceptions, and put in a farther Answer, and an insufficient Answer being no Answer, the Motion must now be decided, as if no Answer had been put in; and therefore, the Injunction must be extended to stay Trial.

The Order was made accordingly (a).

THE

(a) *Ex Relatione*, Mr. *Fisher*. The following Case was produced from the Register's Book:

*The GOVERNOR and COMPANY of the ROYAL EX-  
CHANGE ASSURANCE v.  
BARKER.*

14th Dec. 1737.—The

Plaintiffs obtained the common Injunction to stay the Defendant's Proceedings at Law until Answer, Clearance of Contempt, and farther Order.

3d Feb. 1738.—The Defendant not having put in his Answer, the Plaintiffs on this

1813.

LINCOLN'S  
INN HALL,  
March 17.

Notice of Motion to dismiss the Bill for Want of Prosecution, Three Terms having elapsed after Answer without Replication, not necessary: nor the Six-Clerks Certificate on the Motion, if produced to Register, when the Order is drawn up.

### THE ATTORNEY-GENERAL v. FINCH.

THE Answer having been filed on the 28th of May, 1812, and no farther Proceedings having taken place in the Cause, the Defendants obtained the usual Order on the 20th of February, to dismiss the Bill for Want of Prosecution: but their Clerk in Court refused to procure the Six-Clerk's Certificate; as no Note had been given to the Plaintiff of the Intention to dismiss the Bill, and that, therefore, it was contrary to the Practice in the Office. On the 24th of February an Order was made, that the Defendant's Clerk in Court

Day, being a Saturday, moved, that the Injunction might extend to stay Trial. The Defendant's Counsel stated, that the Answer would be put in on Monday; upon which the Court did not make any Order.

6th Feb. 1738.—The Defendant's Answer not having been put in, the Plaintiffs again moved the Court on this Day that the Injunction might extend to stay Trial; which, upon hearing an Affidavit of Notice of Motion to the Defendant read, was ordered accordingly.—Reg. Lib. B. 1738. Fo. 169.

12th Feb. 1738.—The Defendant having put in his

Answer, applied to the Court this Day to discharge the Order of the 6th February, extending the Injunction to stay Trial; and the Court upon hearing Counsel for the Plaintiffs and the Defendant's Answer read, ordered the Injunction to extend to stay Trial to be discharged.—Reg. Lib. B. 1738. Fo. 244.

13th Mar. 1738.—From the Register's Minute Book it appears to have been stated to the Court, that Exceptions were taken to the Answer: but the Exceptions were afterwards on the Plaintiff's Motion withdrawn on Payment of Costs.

should

should procure the Certificate: but, before it was obtained, on the 25th of *February* a Replication was filed.

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The

ATTORNEY-

GENERAL

v.

FINCH.

A Motion was made by the Defendants, that the Replication may be withdrawn, and the Bill dismissed with Costs for want of Prosecution as of the 20th of *February*; and that the Relators, or the Defendant's Clerk in Court, may pay the Costs.

*Sir Samuel Romilly, and Mr. Beames, in support of the Motion.*

That Rule of Practice, which entitles a Defendant to dismiss the Bill, if Three Terms have elapsed without any Step taken by the Plaintiff (*a*), cannot now be disputed; and few Rules have a more salutary Effect by limiting the Period of vexatious Delay. The Question is, whether the Defendants, being within the Terms of the general Rule, and having obtained the Order to dismiss, shall be detained in Court by a Replication, filed after that Order was obtained. The Bill was virtually out of Court the Moment the Order was pronounced; the Order being the efficient Proceeding; and the Act of drawing it up being merely for the Purpose of recording it, and giving Authority for the subsequent Proceedings for Costs. This is confirmed by the Manner, in which the Books of Practice speak of the different Modes of meeting a Motion to dismiss; which are Three: filing a Replication, moving to amend, and undertaking to speed the Cause (*b*). It is true, this Order was obtained in the

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|--------------------------------------|-------------------------------------------|
| ( <i>a</i> ) 1 <i>Prax. Alm.</i> 34. | Pract. 226. <i>Newland's Pract.</i>       |
| 2 <i>Harrison's Pract.</i> 605.      | 106.                                      |
| Pract. Reg. 178. <i>Turner's</i>     | ( <i>b</i> ) <i>Newland's Pract.</i> 107. |
|                                      | 109.                                      |

## CASES IN CHANCERY.

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 The  
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 v.  
 Fixon.

present Case without producing the Six-Clerk's Certificate: but by the modern Practice that is unnecessary, when the Motion is made; and it is sufficient, if the Certificate is produced to the Register, before the Order is drawn up; although not obtained, when the Order was made; as decided by your Lordship after mature Consideration in *Wills v. Pugh* (*a*), followed by *M'Mahon v. Sisson* (*b*).

**Mr. Johnson**, for the Relators.

**The Lord CHANCELLOR** declared, that the Practice does not require a Defendant to hand over to the Plaintiff a Note of his Intention to dismiss the Bill; that the Courtesy, as it is termed, among the Clerks in Court, is not wholesome; being in direct Opposition to a general Rule of Practice, laid down by the Court (*c*); that the Practice to move without producing the Certificate is established in the Two Cases cited: the Defendant moving on his Title to have that Certificate; and producing it, when the Order is to be drawn up: a Practice too long settled to be now altered: that, the Defendants therefore having a clear Right to the Certificate in this Instance, this Application must be granted with Costs, to be paid by the Relators.

Afterwards, upon the Suggestion, that the Omission to file the Replication was a mere Slip, it was ordered, that the Replication should not be withdrawn; but the Information was retained, the Relators paying all the Costs.

(*a*) 10 Ves. 403.  
 (*b*) 12 Ves. 465. Browne  
 v. Byre, *ante*, 310.

(*c*) *Jackson v. Purnell*,  
 16 Ves. 204, and the Re-  
 ferences in the Note (*a*).

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LINCOLN'S  
INN HALL.  
March 30.

April 15.

Writ of Ne  
*exeat Regno*  
discharged  
with Costs ;  
having issued  
against the  
Captain of an  
*East-India*  
Ship, when  
just sailing for  
India after a  
considerable  
Residence in  
this Country.

## DICK v. SWINTON.

**I**N March, 1804, the Defendant, as Captain of an East-India Merchant Ship, and *William Dick*, as Purser, being about to sail to the *East Indies*, agreed to be jointly interested in the trading Adventures, Freight, Tonnage, Passage Money, and Profits, to which they would be entitled, as Captain and Purser, during the Voyage, in the Proportions of Four-fifths to *Swinton*, and One-fifth to *Dick*. In April, 1806, *Dick* died intestate, and unmarried. A Bill, filed by his Administrators, prayed an Account and the Writ of *Ne exeat Regno*; and the Motion for the Writ was supported by an Affidavit, that the Defendant was at the Decease of *William Dick* indebted to him in the Sum of £1000 at least, on account of the Monies, received by the Defendant in respect of the Adventure, &c. stating the Belief of the Deponent, that the Defendant was about to leave *England*, and to proceed to the *East Indies*, or some other Parts beyond the Seas, being appointed Captain of the *Carnatic East-India-Man*; and was preparing to sail in a few Days.

Mr. Sidebottom, in support of the Motion.

The Lord Chancellor inquired as to the Nature of the Trade; whether it was a legal Trade; and whether the Dealings were such as were allowed to be carried on by the *East-India Company*; requiring the Deponent to add to the Affidavit, that the Dealings and Transactions were, as he believes, legal.

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DICK  
v.

SWINTON.

The Affidavit was accordingly amended; stating farther the Belief of the Deponent, that the Trade, so agreed to be carried on by *William Dick* and the Defendant, and which was afterwards so carried on by them, was a legal Trade, and not prohibited by the Laws of this Country, or the Charters or Regulations of the *East India Company*. Upon that Affidavit the *Lord Chancellor* granted the Writ; ordering it to be indorsed for £1000.

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April 15.

A Motion was made to discharge the Writ of *Ne exeat Regno* under the Circumstances, stated by the Answer; that the Account had been settled by a common Agent; leaving a Balance against the Defendant of £391; and, the Defendant having been several Months in *England*, the Bill was filed, and the Writ obtained, just as he was sailing from the River as Captain of an *India Ship* in the usual Course. The Ship being at *Gravesend*, he obtained Leave from the *East India Company* to permit another Captain to navigate her to *Portsmouth*; and coming to Town, put in his Answer; submitting to pay into Court the Balance of £391.

Sir *Samuel Romilly*, and Mr. *Cooke*, in support of the Motion, observing, that this Writ is a most powerful Instrument, contended, that such an Application of it was an Abuse, that ought to be marked with Costs: the Defendant having been so long in this Country without any Attempt to enforce this Demand until the Instant of his Departure in the usual Course as Captain of an *India-man*; when it was notorious, that he could not be detained without absolute Ruin; and must therefore submit to the Terms imposed; and farther insisting, that this Writ was improperly applied to such a Departure from this Country for a temporary Purpose without a View to permanent Residence abroad.

Mr.

Mr. Hart, for the Plaintiffs, maintained their Right to this Writ upon the Affidavit of an equitable Debt, and their Belief, that the Defendant was leaving the Country.

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—  
DICK  
v.

SWINTON.

*The Lord CHANCELLOR.*

I quite agree, that this Writ is a most powerful Instrument; and I never apply it without Apprehension. This Court has made Use of this great prerogative Writ for the Purpose of holding a Man to what is called equitable Bail. Upon this Application I have no Doubt; having frequently observed the Difference in the Practice of the Courts of *King's Bench* and *Common Pleas*. In the *King's Bench*, if a Plaintiff swore to any Debt, however large the Amount, the Defendant was arrested; and obliged to find Bail for that Sum. I believe, they have lately altered that Practice: but the Court of *Common Pleas*, when I was Chief Justice, always entered into the Propriety of the Affidavit; and reduced the Bail accordingly. So this Writ has been modelled upon the View, which the Court has taken upon the Answer as to the Sum, for which the Defendant ought to be held to Bail.

Writ of *Ne exeat Regno*, a great prerogative Writ, applied to the Purpose of equitable Bail.

Practice of the Court of *Common Pleas* to examine the Affidavit to hold to Bail, reducing the Bail accordingly, lately adopted by the Court of *King's Bench*.

This Writ has issued under these Circumstances: a Demand arising several Years ago: the Account settled by a common Agent: that Settlement leaving a Balance of £391 to be paid by the Defendant, known to be the Captain of an *India Ship*, and the Time of her sailing known; and no Reason appears, why this Writ should not have issued, so that the Answer might have been put in, and the Thing settled, long ago. In such a Case it is extremely reasonable, that the Defendant should be discharged, paying into Court the Balance of £391, deducting the Costs he has been put to. Let him pay in that Sum with Liberty to apply for the Costs, when taxed (a).

(a) See the brief View of the Writ of *Ne exeat Regno* by Mr. Beames.

1813,

April 23.

*Ante*, p. 202.

An Issue directed. Liberty for each Party to examine the other refused without Consent.

### HOWARD v. BRAITHWAITE.

**I**N this Cause (*a*) the Lord Chancellor again went through the Circumstances; and, repeating the Opinion he had formerly expressed, declared, that the Court could not decree a specific Performance; but would direct an Issue, if the Plaintiffs chose to take it, whether the Defendant's Solicitor was lawfully authorized to sign the Agreement; though, the Plaintiff's Solicitor being dead, and Ashton, it was said, not to be found, the Plaintiffs would try it with great Disadvantage; that, if the Plaintiffs would not try it, the Bill must be dismissed; but the Court would never give Costs in such a Case.

Mr. Leach, for the Plaintiffs, accepted the Offer of an Issue; and proposed, that each Party should have Liberty to examine the other as a Witness.

The Lord CHANCELLOR said, that was a very important Consideration; and could not be without Consent.

The Decree was pronounced accordingly for an Issue without that Direction.

(*a*) Reported *ante*, p. 202.

WINCH

## WINCH v. WINCHESTER.

ROLLS.  
1812,  
Dec. 18.

**I**N December, 1809, the Plaintiffs, as Trustees under a Deed, executed by *Edward Jewhurst*, put up to Sale by Auction an Estate described by the Particular as "containing by Estimation Forty-one Acres, be the same more or less," and as being in the Occupation of *Edward Jewhurst*. At the Sale *John Ayerst*, as the Agent of the Defendant, became the Purchaser; and signed an Agreement for that Purpose; and shortly after the Sale entered into Possession. The Bill prayed a specific Performance.

The Defendant by his Answer stated, that he was induced to purchase under the Impression, that the Farm contained the particular Quantity of Land alleged; that his Agent previously to the Sale had been informed by *Jewhurst*, in answer to an Inquiry, that the Estate consisted of Forty-one Acres; and had at the Sale and previously to its commencing publicly asked the Auctioneer, what Quantity he sold the Farm for; who replied, "Forty-one Acres;" adding "if the Purchaser does not like to take it so, it shall be measured: and if it proves more, the Excess must be paid for; if less, an Abatement shall be made." The Answer farther stated, that the Land had been since measured, and amounted only to between Thirty-five and Thirty-six Acres; but the Defendant submitted to perform the Agreement, having an Abatement for the Quantity of Land deficient.

Sir *Samuel Romilly*, and Mr. *Newland*, for the Plaintiffs, insisted, that a specific Performance must under the Circumstances be decreed; and mentioned *Higginson v.*

## CASES IN CHANCERY.

1812.

~~W~~WINCH  
v.

WINCHESTER.

*Clowes (a)*, as an Authority, that parol Evidence of Declarations by the Auctioneer cannot be read to explain the Particular of Sale.

Mr. Hart, and Mr. Grimwood, for the Defendant.

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## The MASTER of the ROLLS.

This Bill seeks to compel the Defendant specifically to perform an Agreement, into which he entered for the Purchase of an Estate, which had belonged to *Jewhurst*; who conveyed to the Plaintiffs, on Trust to sell for the Payment of his Debts. The Plaintiffs, as Trustees, put the Estate up to Sale by Auction in 1809. The Defendant through his Father-in-law *Ayerst* was the Purchaser; who signed the Agreement on the Particular. The Description of the Estate in the Particular represents it as containing by Estimation Forty-one, Acres be the same more or less. The only Objection made is, that the Estate does not contain Forty-one Acres; but upon Measurement appears to be less than that Quantity by Five Acres and a Fraction: the Defendant insisting upon an Abatement out of the Purchase-money for this Difference; first, upon the Specification of Quantity in the Particular; next upon the Ground of a Representation, or Warranty, verbally given by the Auctioneer at the Time of the Sale.

As to the Effect of the Words "be the same more or less" in a Particular of Sale, *Quare.*

First, the Effect of the Words "more or less," added to the Statement of Quantity, has never been yet absolutely fixed by Decision(*b*); being considered, sometimes as extending only to cover a small Difference, the one Way, or the other; sometimes, as leaving the Quantity altogether uncertain, and throwing upon the Purchaser the

(*a*) 15 Ves. 516; and see (*b*) *Hill v. Buckley*, 17 Fa.  
*Clowes v. Higginson, Post.* 394.

Necessity

Necessity of satisfying himself with regard to it. In this Instance the Description is rendered still more loose by the Addition of the Words "by Estimation." The estimated Extent of Ground frequently proves quite different from its Contents by actual Measurement. It cannot be contended, that the Terms "estimated" and "measured" have the same Meaning. If a Man were told, that a Piece of Land was never measured, but is estimated to contain Forty-one Acres, would that Representation be falsified by shewing, that, when measured, it did not contain the specified Number of Acres? The only Contradiction to that Proposition would be, that it had not been estimated to contain so much.

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WINCH  
v.

WINCHESTER.

Supposing, that the Vendors knew the true Quantity, it would be a different Question, whether by the Use of such Phrases they could be protected from the Obligation to make it good. Some Attempt was made to affect them with such Knowledge through the Medium of *Jewhurst*; who, according to the Testimony of one *Noakes*, when a Valuation of the Lands in the Parish was making by Direction of the Parishioners, stated to the Valuers the Contents of his Farm, as amounting only to Twenty-nine Acres, exclusive of Hedges, Roads, and Waste; and said, the Map Account was Thirty-six Acres; and then one *Springet* deposes, that Two or Three Days before the Sale *Jewhurst* walked over the Farm with him; and specified the Contents of the different Fields; which, being added together, amounted to Forty-one Acres.

What *Jewhurst's* own Knowledge, or Belief, was upon this Subject is not ascertained. He may as well be supposed to have purposely under-stated the Quantity on the one Occasion as to have over-stated it on the other; but, be that as it may, it is not shewn, that the Plaintiffs knew any Thing of either Statement. It does not appear, that

*Jewhurst*

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WISCH  
T.  
WISCHERZL.

*Jurat* was employed by them to shew, or describe, the Lands; or was in any way their Agent. They are therefore not bound by any Representation of his: and, putting Fraud, as it must be put, out of the Question, I do not conceive, that the Defendant is entitled to an Abatement out of the Purchase-money for the Deficiency of Quantity.

The Question then is as to the Admissibility, and next as to the Sufficiency, of the Evidence of the Auctioneer's Declaration at the Sale. The Defendant says, *Ayer*, his Agent, distinctly inquired of the Auctioneer, for what Quantity he sold the Farm; and the Auctioneer answered "we sell it for Forty-one Acres: but, if the Purchaser does not like to take it so, it shall be measured; and, if it proves more, the Excess must be paid for: if less, an Abatement shall be made."

As to the Admissibility of the Evidence, it must depend upon the Purpose, for which it is produced. If the Defendant insists, that, the Evidence being received, he will be entitled to have the Contract performed with an Abatement of the Price, I think it not admissible for that Purpose; as the Court cannot execute in his Favor a written Agreement with a Variation introduced by parol Testimony: but, if he says, he was deceived by this Representation, and therefore was induced by Fraud to enter into the Contract, and offers the Evidence for the Purpose of getting rid of such Contract altogether, for that Purpose, I think, it may be received; as, if such a Declaration was made by the Auctioneer, it would undoubtedly be fraudulent and unfair in the Plaintiffs to insist upon the Execution of the Contract, not giving the Defendant, the Benefit of that Declaration (*a*).

(a) *The Marquis of Townshend v. Stangroom*, 6 Ves. 328. 165, and the References. *Clowes v. Higginson*, Post. *Ramsbottom v. Gusden*, Ante,

With

With regard to the Evidence itself, Three Witnesses depose positively to the Declaration, as made by the Auctioneer in the Terms I have mentioned: Two, of the Name of Springet, do not recollect, that it was preceded by any Inquiry from any Person: but Ayerst says, it was an Answer, made to an Inquiry by him in the Hearing of all the Persons present; and Two of the Plaintiffs, he says, were present, and did not contradict the Auctioneer. On the other Hand, the Auctioneer, being examined, does not in plain and explicit Terms deny such Declaration; but says, he did not make any Declaration contradictory to the Representation by the Particular; and that he was not authorized to make the Declaration, specified by Ayerst, and stated in the Answer; not, that he did not make a Declaration in those Words. That Declaration is therefore made out sufficiently by the Evidence.

It is said for the Plaintiffs, that, at most, this gives an Option to the Defendant either to take the Land as Forty-one Acres, or to have it measured: and that by taking Possession, and beginning to cultivate the Land, he waived that Option, and consented to take it as Forty-one Acres: but, if the parol Evidence is to be taken as the Rule, the Defendant was to have the Land, be the Quantity what it might: the Measurement was material only to ascertain the Price; and therefore was in Time, if before the Payment. Several Observations were made upon the Inconsistency of the Defendant's Conduct on the Supposition, that the Payment was to be by Measurement: if so, the measuring was as much of course as the valuing of the Timber, or the Stock; and yet no Proposition came from the Defendant for Measurement; and it was by mere Accident, that, the Persons, who were to value the Timber, not being able to agree upon the Value of a Copse-wood in one Field, and having that measured,

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measured, *Ayerst* said, as they were measuring Part, they might as well measure the whole. The Defendant thought so little of measuring the Land, that he appointed a Day for finally settling the Business; not knowing, that any Measurement had taken place; and at that Meeting he was informed by *Ayerst* of the Measurement and the Result. Upon that a long Negotiation and Correspondence took place, and several Meetings; and at none of them did the Defendant insist upon this parol Declaration, supposed to have been made at the Auction: whereas the Objection was plain: no Matter, what the Conditions of Sale import: the Auctioneer did say distinctly, that the Land was to be measured, and to be paid for accordingly.

These Circumstances throw a Degree of Doubt upon the Evidence; but are not sufficient to impeach its Veracity, particularly in the Absence of a plain Denial by the Auctioneer himself; and with this Circumstance, that a Witness represents the Auctioneer to have said, at a subsequent Period, that he did sell at Forty-one Acres; and, if it turned out less, there should be an Abatement. The Answer therefore asserting, that such Declaration was made at the Sale, is sufficiently made out; and consequently the Defendant cannot be compelled to take the Land without an Abatement. If he will not take it, the Bill must be dismissed; but without Costs; as the Defence is one, to which he did not resort until after the Institution of the Suit.

BOYD

1813.

LINCOLN'S  
INN HALL.

March 31.

April 2.

Suggestion,  
that the De-  
fendant is  
doubly vexed  
by Suits in  
Equity and at  
Law for the  
same Matter,  
ascertained by

Reference to  
the Master.

## BOYD v. HEINZELMAN.

ON the 28th of January the Defendants, having put in their Answer, obtained an Order, that the Plaintiffs should elect, whether they would proceed at Law or in this Court; on the Allegation, that the Plaintiffs prosecuted the Defendants at Law, and in this Court for one and the same Matter, whereby they were doubly vexed (a).

A Motion was made by the Plaintiffs to discharge that Order with Costs for Irregularity; as obtained on a false Allegation (b).

Mr. Leach, and Mr. Shadwell, in support of the Motion, contended, that this Order was obtained upon a false Allegation; and the Plaintiffs, being, as in the Case of a Mortgage (c), entitled to proceed both at Law and in Equity, could not be put to Election; that, having Bills of Exchange, they were at Liberty to proceed on those Bills at Law, and to come into this Court to establish their Lien on the Goods, consigned to the Defendants to answer the Debt: a collateral Security not having the Effect of releasing the personal Remedy.

Sir Samuel Romilly, for the Defendants, insisted, that it was of course to put a Party to elect; and if he

(a) See *Jones v. Earl Stafford*, 3 P. Wms. 90, and Note (b) as to this Practice.

(c) See *Lyster v. Dolland*, 1 Ves. jun. 431. *Booth v. Booth*, 2 Atk. 342.

(b) *Bullen v. Butcher*, 2

## CASES IN CHANCERY.

1813.  
~~  
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objects, the usual Practice is a Reference to the Master; that this bears no Resemblance to a Mortgage; being a personal Demand in Equity, and a personal Demand at Law: a Suit and an Action for one and the same Matter.

*The Lord CHANCELLOR.*

The only Question is, whether the Court is in the Habit itself of looking into the Matter, to see, whether the Suggestion is false, or of sending it to the Master to ascertain the Fact. As far as my own Experience goes, when an Order, proceeding upon such a Suggestion, is questioned, the Court does not take upon itself to examine it, but sends it to the Master; and the Principle of that Proceeding is, that, though the Fact may be sometimes a very simple one, it is often very complicated; and, if the Court were to examine it in the one Case, it must in the other; and there would be no End to the Inconvenience.

Mr. Leach, mentioned the Case of *Mouseley v. Basnett*, from the Register's Book.

*The Lord CHANCELLOR*, having read the Note, said that was the Course; and the Order might be made conformably to it.

The Order was accordingly made in the Terms of *Mouseley v. Basnett (a)*.

(a) *Mousley v. Basnett*, 23d Feb. 1790.—Reg. Lib. B. 1789, Fo. 212.

By the Order, reciting, that by an Order made in this Cause the 10th Day of Feb.

inst. suggesting, that the Plaintiff prosecuted the Defendant both at Law and in this Court for one and the same Matter, whereby the Defendant was doubly vexed, it

it was ordered that the Plaintiff, his Clerk in Court, and Attorney at Law, having Notice thereof, should within Eight Days after such Notice make his Election, in which Court he would proceed, and if the Plaintiff should elect to proceed in this Court, then the Plaintiff's Proceedings at Law were thereby stayed by Injunction, but if the Plaintiffs should elect to proceed at Law, or in Default of such Election by the Time aforesaid, then the Plaintiff's Bill was from thenceforth to stand dismissed out of this Court as against the Defendant with Costs to be taxed, &c. and stating, that it was alledged, that the said Order was obtained on a false Suggestion, for that the Matters, for which the Plaintiff is proceeding at Law and in this Court, are not the same, but distinct Matters, and therefore it was prayed, that this Order might be discharged, and that the Defendant might pay to the Plaintiff the Costs of this Ap-

plication to be taxed, his Lordship doth order, that it be referred to the said Master to see, if the Plaintiff's Proceedings at Law and in this Court are for and touching the same Matters; and he is to state the same with his Opinion thereon to the Court: but the Plaintiff is to be at Liberty to proceed in the Action at Law in the mean Time.

The Master made his Report, bearing Date the 13th Day of *April*, 1790; and thereby certified, that he was of Opinion, that the Plaintiff's Proceedings at Law and in this Court against the Defendant were not for and touching the same Matters; and on the 16th *April*, 1790, the Plaintiff applied to the Court to discharge the Order of the 10th of *Feb.* and that the Defendant might pay unto the Plaintiff the Costs of the said Reference, and also the Costs of this Application, to be taxed by the Master; which the Court ordered accordingly.—Reg. Lib. B. 1789. Fo. 137.

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In the Vacation after *Hilary* Term, the following Appointments took place :

Sir *Thomas Plumer*, His Majesty's Attorney-General, was appointed *Vice Chancellor* of *England* under an Act of Parliament passed in this Session.

Sir *William Garrow*, His Majesty's Solicitor-General, was appointed Attorney-General.

Mr. *Dallas*, Chief Justice of *Chester*, was appointed Solicitor-General.

In *Easter* Term Mr. *Richards* was appointed Chief Justice of *Chester*.

END OF THE SECOND PART.

# CASES IN CHANCERY, &c.

1813, 52 Geo. 3.

HUMBERSTONE v. STANTON.

ROLLS.

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Jan. 28.

Feb. 1.

*JOSEPH Judge by his Will, dated the 4th of May, 1781, giving £750 3 per Cent. Bank Annuities to Trustees for his Wife for Life, and directing them to sell out £50, Part of such Bank Annuities, for placing out his Son Joseph Apprentice, proceeds as follows: " And " from and after my dear Wife's Decease I give and bequeath £450 of the said Stock, or in case the £50 Stock shall be sold to put forth my said Son Joseph an Apprentice, then and in such Case only £400 of the said Stock to my said Son Joseph to be transferred to him on his completing and fully accomplishing his Apprenticeship; and the Interest, Dividends, and Profits, thereof in the mean Time to be applied by my said Trustees for his my said Son Joseph's Clothing and Necessaries to the other Children.*

The Legacy lapsed by the Death of the Legatee, having accomplished his Apprenticeship, in the Testator's Life.

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## CASES IN CHANCERY.

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" cessaries during and until he hath accomplished his Apprenticeship; and in case my said Son *Joseph* should die before he accomplishes his Apprenticeship, then and in such Case I give the said £450 Stock, or £400 Stock, as under the aforesaid Bequest it may happen to be, to my aforesaid Son *Richard*, and my aforesaid Three Daughters *Anne*, *Elizabeth*, and *Mary*, or to such of them as may be living at the Time of this Contingency happening, equally to be divided between them Share and Share alike: but if any of them should be dead at the Time of such Contingency" the Parents Share to devolve to the Issue.

The Testator bequeathed the Residue of his personal Estate to his Wife; appointing her and Three other Persons Executors. After the Execution of his Will he placed his Son *Joseph* out an Apprentice; who, having compleated his Apprenticeship, died in *September*, 1790, in his Father's Life-time; who died in *January*, 1792.

The Plaintiff, as the personal Representative of the Testator's Widow and residuary Legatee, filed the Bill; praying, that she may be declared entitled to the £450 Stock.

Mr. Hart, and Mr. Bell, for the Plaintiff.

The Persons, to whom this Legacy of Stock is given over upon the Death of the Testator's Son *Joseph* before his Apprenticeship accomplished, are not entitled in the Event, that has happened: but by the Death of the Legatee in the Testator's Life it falls into the Residue as a lapsed Legacy. The Bequest over, only upon an Event, which never happened, cannot take Effect, as if that Event had happened. The Cases, *Jones v. Westcomb* (a),

(a) *Pre. in Ch. 316.*

and

and *Statham v. Bell* (*a*), where the Limitation upon the supposed Pregnancy of the Testator's Wife was established, though she proved not to have been pregnant, and therefore the Event contemplated never happened, are distinguished in this Respect; that the Legatee under this Will lived to attain the Period, at which his Legacy was to vest: an Event, the Completion of which within the Terms of this Will destroys the Limitation over: the Legacy failing afterwards, by the Death of the Legatee, not before the Period, at which he would have taken a vested Interest, but during the Testator's Life; the common Case of Lapse. The Case of *Northey v. Strange* (*b*) also was upon the Ground, that the Legatee died before the Testator, and under Twenty-one: but there is no Instance, that, the Legatee dying after having attained the Age of vesting, the Limitation over was allowed to take Effect on the Ground, that the Legatee, not having survived the Testator, never actually received the Legacy. In the one Case the Testator contemplates a particular Event, as preceding the Limitation over; and, if that Event never happens, the preceding Estate being removed out of the Way, whether by the Person to take never coming into Existence, or the Life not enduring to a particular Age is immaterial, the Limitation over is brought forward; and takes Effect: in the other Case the Event has happened, upon which the Will declares, that the Limitation over cannot take place; and the general Law determines the Legacy lapsed, as if there was no Disposition.

Sir Samuel Romilly, and Mr. Grimwood, for the Defendants, claiming under the Limitation over, contended, that this fell within the Case of *Jones v. Westcomb*: a mere Question of Intention, whether, if this Son could

(*a*) Coup. 10.

(*b*) 1 P. W. 340.

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not

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not take, the Legacy should not go over to the other Children.

The Master of the Rolls.

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It being sufficiently proved, that the Son compleated the Term of his Apprenticeship before the Testator's Death, the Question is, whether by his Death afterwards in the Testator's Life-time the Bequest over takes Effect. It seems formerly to have been a Question, whether a Bequest over in case of the Death of the Legatee before a certain Period could take Effect, when he died during the Testator's Life, though before the Period specified. In the Case of *Willing v. Baine* (a) Legacies were given to Children, payable at their respective Ages of Twenty-one; and if any of them died before that Age, the Legacy, given to the Person so dying, to go to the Survivors: one having died under Twenty-one in the Life of the Testator, it was contended, that his Legacy lapsed; and did not go over to the Survivors. The Argument was, that the Bequest over could not take place; as "there can be no Legacy, unless the Legatee survives the Testator: the Will not speaking till then: wherefore this must only be intended, where the Legatee survives the Testator; so that the Legacy vests in him, and then he dies before his Age of Twenty-one."

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his Death with-
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during the Tes-
tator's Life.

It was however held, and is now settled, that in such a Case the Bequest over takes place. Here however it is contended, that though the Legatee has survived the specified Period, or Event, and though the Contingency, upon which alone the Legacy is given over, has not happened, still the Bequest over is to take Effect. If *Joseph*, having compleated his Apprenticeship, had survived the

(a) 3 P. Will. 113.

Testator,

Testator, it is clear, that the Legacy would have vested in him absolutely: for its being given from and immediately after the Death of the Person, entitled for Life, would not have suspended the vesting. The Event, which was to bar the Claim of the Brothers and Sisters, has happened; as he compleated his Apprenticeship before his Death. His Death in the Testator's Life produces Lapse; and lets in the residuary Legatees.

There are Two Cases decisive upon this, *Calthorpe v. Gough* (a) and *Doo v. Brabant* (b). In the former £10,000 was bequeathed in Trust for the separate Use of Lady *Gough*, and, in case she should die in the Life of her Husband, according to her Appointment; and for want of Appointment, among the Children: but, if she should survive her Husband, then the whole to her. The Event, in which the Children were to take, did not happen: that, in which she was to take absolutely, did: but she died in the Testator's Life; and it was determined to be a Case of Lapse. In *Doo v. Brabant* a Legacy was bequeathed in Trust for *Sarah Counsell*, until she should attain Twenty-one; and then to transfer to her: in case she should die under Twenty-one leaving Children, in Trust for her Children; and if she should die under Twenty-one without leaving a Child, or Children, or being such they should all die under Twenty-one, over. She attained Twenty-one; married; and had Children; but died before the Testatrix; leaving Two infant Children surviving her. Lord *Thurlaw* according to *Brown* seems to disapprove of *Calthorpe v. Gough*; and to incline to the Opinion, that upon *Jones v. Westcomb* and other Cases of that Class the Children should be let in to take; but sent a Case to the Court of King's Bench;

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Lapse by  
Death of the  
Legatee in the  
Life of the Tes-  
tator, though  
having sur-  
vived the Pe-  
riod, at which  
the Legacy  
was to vest:  
that Event not  
being provided  
for.

(a) 3 Bro. C. C. 395, n.

(b) 3 Bro. C. C. 393. 4

Term Rep. 706.

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who held with great clearness, that the Children could take nothing. Lord Kenyon says, " if this Event had occurred to the Testatrix, most probably she would have provided for it, and given the Money to the Grandchildren: but, as she has not done so, we cannot make a Will for her."

Lord Alvanley had made a similar Observation in *Calthorpe v. Gough.*

Here the Testator has left his actual Intention, at least as much unexplained as in those Cases. Therefore I must abide by the Words; and according to them there is no Foundation for the Claim, set up by the Defendants. The Plaintiff consequently must have a Decree. The Costs of all Parties should come out of the Estate; being occasioned by the Ambiguity of the Will.

ROLLS.

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 Feb. 4.

### SHEATH v. YORK.

Testator, a Widower, having a Son and two Daughters, by Will gave all his real and personal Estates in Trust, subject to

Debts, for those Children, and in case of their Deaths over. Marriage and the Birth of a Daughter, held a Revocation of the Will in the Ecclesiastical Court, (against a former Decision) not a Revocation of the Devise of the real Estate.

*HENRY Clarke* by his Will gave to Trustees all his real and personal Estate upon Trust to sell; and after Payment of all his Debts, &c. to place out the Residue of the Monies, arising from such Sale on Government or other Security, and pay the Interest, &c. towards the Maintenance and Education of his Son John and Daughters *Mary* and *Elizabeth*, until they should attain

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attain Twenty-one, and then to pay the Principal equally unto and amongst his said Children: but in case all his said Children should die under Age and without leaving Issue, then upon Trust to pay the Residue unto his Cousins *Peregrine Clarke, Henry Clarke, and Mary, the Wife of Joseph Fowdrell*: and he appointed his Trustees Executors and Guardians of his Children..

At the Time of making his Will the Testator was a Widower having the Three Children only named in his Will. He afterwards married a second Wife by whom he had Issue one Daughter. He died in *November, 1810*; and his Son *John Clarke* died an Infant in *September, 1811*.

A Suit having been instituted in the Prerogative Court of *Canterbury*, that Court decreed, that the Will was revoked by the subsequent Marriage and Birth of the Child. A Bill was then filed by some of the simple Contract Creditors of the Testator against the Executors and Trustees of the Testator, his Two Daughters by the first Marriage, and those in Remainder, &c. praying an Account, Payment, and Sale.

Sir *Samuel Romilly*, and Mr. *Heald*, for the Plaintiffs: Mr. *Agar*, for the Defendant *York*, and Mr. *Winthrop*, for those in Remainder, claiming under the Will.

With respect to the Proposition, that a Will is revoked by a subsequent Marriage and Birth of a Child, the Testator having Children at the Time of making the Will, there is probably no Authority to be found except *Thompson v. Sheppard*, briefly mentioned in the Margin of *Ambler (a)*; according to which there is a Revocation

(a) *Jackson v. Hurlock, Lanc, Ambl. 561.*  
*Ambl. 490, and Parsons v.*

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under those Circumstances. It is not however necessary to determine that general Proposition: the Question here being simply, whether a subsequent Marriage and Birth of Children are a Revocation; the Testator having at the Time of making his Will a Son by a former Marriage.

It is not easy to discover the Principle, upon which these Cases of implied Revocation have gone (*a*). The first Case, in which real Estate was involved, is *Christopher v. Christopher* (*b*): but in *Doe on the Demise of Lancashire v. Lancashire* (*c*) Lord Kenyon puts it on a very different Ground, an implied Condition, annexed to the Will itself at the Time of making it, that the Testator does not then intend it to have Effect, if there should be a total Change in the Situation of his Family. In this Case, taking the Marriage and Birth of a Child to be a Revocation, no Benefit, would, as far as the real Estate is concerned, result to Children of the second Marriage; the whole of the real Estate devolving upon the Son by the first Marriage; and that Effect of the Law cannot be controuled by any presumed Intention in Favor of Children by the second Marriage. What Inference does the Marriage afford, that the Testator meant to deprive his Two Daughters by the first Marriage of their Provision? Suppose a Testator died seised of Gavelkind Land, and other Property: how could the Court interfere without an Inquiry, not merely as to the State of the Property but of the Family; and where would the Inconvenience stop? Suppose a Daughter by the first Marriage, and a Son by the second: what would be the Effect of holding the second Marriage and Birth of the Son a

(*a*) See 2 Fonbl. Treat. 1771. See 4 Burr. 2171,
 Eq. p. 350, Note (*b*). 2182. Doug. 35.

(*b*) 2 Dick. 445. In the Court of Exchequer, July 6th,

(*c*) 5 Term Rep. 49.

Revocation

Revocation but to give the Estate to the Son? These Cases may serve to shew the Difficulty of applying this as a general Rule, with reference to the Interest and Convenience of Families. In the Case *Ex parte the Earl of Ilchester* (*a*), Marriage and the Birth of Children were held not to be a Revocation; the Wife and Children being provided for by Settlement. In *Brady v. Cubitt* (*b*), Mr. Justice *Buller* lays it down, that “ implied Revocations must depend on the Circumstances at the Time of the Testator’s Death.” All the Cases have proceeded on the compleat Alteration of the Circumstances of the Testator’s Family; to which his Intention could not be presumed to apply; as by the Marriage of a Bachelor with the Birth of a Child: but Marriage alone is not such a Change; and, therefore, has not been held a Revocation: nor the Birth of Children by a Marriage subsisting at the Date of the Will. The Result of all the Authorities is, that, where a Testator has made an express Provision for his Children, no Circumstances shall by Implication revoke that Act, which he was bound in Duty to perform; on the contrary the Provision shall rebut the Presumption of an Intention to revoke: *Gray v. Altham* (*c*). In the Case of *Kenebel v. Scrafton* (*d*), Marriage and the Birth of Children did not revoke a Will, contemplating and expressly providing for future Children.

(*a*) 7 *Ves.* 348.

(*b*) *Doug.* 31.

(*c*) Cited in *Jackson v. Hurlock*, *Amb.* 490.

(*d*) 5 *Ves.* 663. 2 *East.* 530. See Lord C. *Eldon*’s Observations on this Case in his Judgment in *Wilkinson v. Adam*, *post*. It is a remarkable Instance of the

Inconsistency, to which these Presumptions lead. The Children of *M. A. Simpson* by the Testator could not take under that Description in his Will, except by the Effect of the very Circumstances, (their Birth in Marriage) from which the Revocation of that Will was to be presumed.

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The Case of *Thompson v. Sheppard* was no Decision on real Estate. By the Register's Book (a) it appears, that,

(a) *Thompson v. Sheppard*, 5th December, 1779. (Reg. Lib. 1779. B. Folio 125.)

William Myall, in the Year 1760 married his first Wife in *England*: she died in 1769, leaving by him several Children, the Defendants. After her Death he made his Will, dated 15th December, 1771, having Freehold and personal Estates; and gave the Residue of his Estate and Effects to the Defendants, *Sheppard* and *Duffield*, in Trust to sell and divide among his Children by his first Wife; and made them Executors. Afterwards at *Jamaica* in May, 1772, *Myall* married the Plaintiff *Martha*, (afterwards Wife of Plaintiff *Thompson*) by whom he had Two Children, one of whom died in his *Myall's* Life-time, and the other was born after his Death. He died 20th March, 1774, at *Jamaica*. Suits in the Ecclesiastical Court had been commenced by *Sheppard* and *Duffield* to obtain Probate, and by the Plaintiff *Martha* for Administration as on an Intestacy. The Bill prayed a

Declaration, that *Myall* might be declared to have died intestate; and to set aside a Deed of February, 1775, which the Bill alledged, the Plaintiff *Martha* had been fraudulently induced by *Sheppard* and *Duffield* to execute; whereby she gave up the Right to Administration; and for the consequent Accounts of his Estate.

The Court decreed, that *Sheppard* and *Duffield* proceed in the Suit, instituted by them in the Spiritual Court to obtain Probate; and that the Plaintiff also proceed in the Suit commenced there by her, in order to determine the Question as to his Will, independent of the Deed of February, 1775, which was not to be produced or made Use of in the said Suits in the Determination of the Question; and referred to the Master to take the Account of the personal Estate.

Nothing material appears farther in the Register's Book till the 5th May, 1788. (Reg. Lib. 1788. B. 458.) From the Master's Report, there stated, it appears, that

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that, though the Testator had real Estate, it could not possibly have passed under his Will ; which was not executed so as to pass real Estates. The real Estate therefore is not once mentioned in all the subsequent Proceedings ; and, attending to that Circumstance, the Case is no Authority. Here, there being Children of the former Marriage, that total Alteration in the Family is wanting, on which all the Cases turn ; and which is so much relied on by Lord *Ellenborough* in *Kenebel v. Scrafton*.

Mr. Wingfield, for the Two Daughters by the first Marriage.

the Defendants *Sheppard* and *Duffield* proceeded in the Ecclesiastical Court to obtain Probate of the Will ; and that on 3d *December*, 1779, a Decree was there made for the Validity of the Will ; and Probate was decreed. The Plaintiffs appealed to the Delegates ; which Appeal they afterwards withdrew, and, to prevent all farther Litigation, an Agreement was executed by the Parties, dated 14th *August*, 1780, whereby they agreed to terminate their Differences upon the Terms therein mentioned, and the Plaintiff agreed to give no farther Opposition to the Probate and all Matters were settled, except as to the Costs in this Court,

which the Defendants would not allow to her. By an Order, 24th *February*, 1782. (Reg. Lib. 1782.B. Folio 205.) it was referred to the Master to inquire, whether that Agreement was for the Benefit of the Infants, and the Persons claiming under the Will of the Testator. The Master made his separate Report 20th *December*, 1782 ; and certified, that the Agreement was for the Benefit of the Infants ; and that it had been carried into Execution ; and now on the coming on of the Cause on that Report it was referred to the Master to tax all Parties their Costs, and Directions were given for the Purpose of winding up the Cause.

This

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This Case, though new in its Circumstances, all former Cases applying to Widowers or Bachelors without Children at the Time of making their Wills, fall within the general Rule, holding the Marriage and Birth of a Child a Revocation, upon the Presumption, that the Will was not intended to apply to such an Alteration of Circumstances. In *Brady v. Cubitt* Lord Mansfield takes the Distinction between a total and a partial Disposition: and in *Doe on the Demise of Lancashire v. Lancashire* Lord Kenyon puts it, not upon an Alteration of Intention, as the Testator may be ignorant of the Effect at Law of subsequent Events upon his Will, but upon a tacit Condition, annexed to the Will, that under such a total Change of Circumstances it should not stand. The Decision of the Ecclesiastical Court on this Case may be placed against the Authority of *Thompson v. Sheppard*. If there is any Hardship in establishing the Revocation under these Circumstances, it is the Effect of a settled Rule of Law: this Case having none of the Circumstances, which have been considered as Exceptions.

Sir Samuel Romilly, in Reply.

The Argument on this Case shews the extreme Danger of Courts assuming the Power of legislating. The Effect is great Difficulty in ascertaining the Rule, always fluctuating; and there are no Means of distinctly tracing the Principle, upon which the different Decisions have proceeded. The Case of *Kenebel v. Scrafton* proceeded on its own peculiar Circumstances: but few Decisions could have been more opposite to the actual Intention of the Testator in the possible Event, that there had been many Children born before the Marriage, and only one born after; the latter monopolizing the whole Property. In holding a Marriage when coupled with the Birth of a Child, a Revocation, the Courts seem to have proceeded

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on the Effect, that the Children would otherwise be unprovided for: Marriage, therefore, as standing by itself, has not been held a Revocation, but the Moment a Child comes into Existence the Will has been considered as revoked, as the only Means of obviating the Injustice the Courts would guard against.

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The MASTER of the ROLLS.

Long after it had been settled by Decisions of the Marriage and Ecclesiastical Court, with the Concurrence of Common Law Judges, sitting in the Court of Delegates, that Marriage and the Birth of a Child would amount to a Revocation of a Will of personal Property, it remained a Doubt, whether such an Alteration of Circumstances would have the same Effect with regard to a Will of real Estate: but it is now settled, that even a Devise of Land may be revoked by what Lord Kenyon in the Case of *Doe on the Demise of Lancashire v. Lancashire* (a) calls "a total Change in the Situation of the Testator's Family." What shall be deemed such a total Change may be Matter of Controversy in each new Case: but all the Cases, in which hitherto Wills of Land have been set aside upon this Doctrine, have been very simple in their Circumstances; and such as, when the Doctrine was once received, could admit of no Doubt with respect to its Application. In all of them the Will has been that of a Person, who, having no Children at the Time of making it, has afterwards married, and had an Heir born to him. The Effect has been to let in such after-born Heir, to take an Estate, disposed of by a Will, made before his Birth. The Condition, implied in those Cases, was, that the Testator, when he made his Will in Favor of a

Even a Devise of Land may be revoked by Implication from a total Change in the Situation of the Family, as, the Devisor having no Children at the Date of the Will, by his Marriage and the Birth of an Heir; upon an implied Condition, that the Will should not operate in that Event.

(a) 5 Term Rep. 58.

Stranger

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Stranger or more remote Relation, intended, that it should not operate, if he should have an Heir of his own Body.

In this Case there is no Room for the Operation of such a Condition; as this Testator had Children at the Date of the Will; of whom one was his Heir apparent; who was alive at the Time of the second Marriage, of the Birth of the Children by that Marriage, and of the Testator's Death. Upon no rational Principle therefore can this Testator be supposed to have intended to revoke his Will on account of the Birth of other Children; those Children not deriving any Benefit whatsoever from the Revocation; which would have operated only to let in the eldest Son to the whole of that Estate, which he had by the Will divided between that eldest Son and the other Children of the first Marriage.

It is true, the Ecclesiastical Court has decided, that the Will was revoked as to the personal Estate: that is in Opposition to their Decision in *Thompson v. Sheppard*, in 1779; where under Circumstances precisely the same the Will was held not revoked even as to the personal Estate. There was in that Case an Appeal to the Delegates, but it was not prosecuted. The Revocation however as to the personal Estate had an Effect, which might perhaps have been intended by the Testator: that of letting in the after-born Children with those of the first Marriage: but the Principle of the Decision has no Bearing whatsoever upon the Devise of the real Estate; which according to my Opinion stands unrevoked.



WHITE

WHITE v. ST. BARBE.

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ALEXANDER St. Barbe by his Will, dated the 2d of July, 1797, disposed of his Property in the following Manner:

" All Monies and Property belonging to me I give to my Wife *Mrs. Christian St. Barbe*, in Trust for her to dispose of to our Children, and whenever she may judge most proper for their Interest: she may, if she thinks proper, keep the Whole for her Life, and then leave it to our Children; and she may make Distinctions in leaving more to one than the other, if she pleases, in order to make them behave well: but the Whole of the Property must be given into the Family; except I give all the Household Goods, Plate, Linen, and China to *Mrs. St. Barbe* for her to do with as she pleases, and as her sole Property."

Under a Power to appoint among Children Interests may be given to Grand-children by way of Settlement with the Concurrence of their Mother, an Object of the Power, and her Husband.

The Testator died in 1799, leaving Three Daughters: *Elizabeth Fielder*, *Catharine Randolph*, and *Christian White*. *Mrs. St. Barbe* having advanced Portions to each of her Daughters out of the Testator's residuary Estate, there remained, after those Advances, £4875, 3 per Cent. Bank Annuities, and £1561:3s:7d. 5 per Cent Navy Annuities.

By a Deed of Appointment, dated the 28th of June, 1806, reciting, that *Christian St. Barbe* was desirous, and had agreed, in exercise of her Power under the Will of her Husband to appoint the £4875 3 per Cents. and £1000 .(Part of £1561:5s:7d.) Navy Annuities, expectant

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pectant on her own Decease, in Favor, and for the Benefit, of *Christian White*: and that it had been agreed, and especially by *Charles Henry White* and *Christian*, his Wife, that the Funds so to be appointed should be settled upon the Trusts therein mentioned for the several Benefits of *Christian White*, and her Children; and that, in order to declare and secure the respective Interests of *Christian White* and her Children, in such Funds, *Christian St. Barbe* should forthwith transfer them into the Names of the Trustees, in pursuance of that Agreement *Christian St. Barbe* covenanted with the Trustees at the Request and by the Direction of *White* and his Wife, that she would transfer the £4875 and £1000 Stock into the Names of the Trustees: and it was declared, and *Christian St. Barbe* did by such Direction as aforesaid in exercise of her Power under the Will and all other Powers enabling her thereto appoint, that they should settle the said Stock, when transferred to them, upon the following Trusts: in Trust, as to the Dividends and annual Produce, for *Christian St. Barbe* for Life; and after her Decease, as to the same Dividends and Produce, unto *Christian White* for Life, and after the Decease of the Survivor, in Trust as to the principal Sums of £4875 and £1000 Stock for all and every the Children of *Charles Henry White*, and *Christian* his Wife, then born and thereafter to be born equally; and to an only Child, if but one.



Shortly after Execution of this Appointment *Christian St. Barbe* transferred the Stock according to her Covenant. Soon afterwards in the same Year *Christian White* died; leaving Two Daughters, the Plaintiffs, her only Children. Her Husband took out Administration to her.

By another Indenture, dated the 22d of October, 1806, reciting the Appointment of the 28th of June, it is witnessed,

witnessed, that for declaring and giving Effect to such of the Trusts and Purposes of the Deed of Appointment as were still subsisting or capable of taking Effect, and for providing for the Event of the Failure of all such Trusts and Purposes, the Trustees should stand possessed of the £4875, and £1000 Stock, upon Trust, as to the Interest, for *Christian St. Barbe* for Life, and, after her Death, to pay the Principal between the Plaintiffs *Eleanor St. Barbe White*, and *Christiana St. Barbe White*, the only Children of *Charles Henry White* by *Christian* his Wife, in equal Shares and Proportions, to vest at Twenty-one or Marriage with Benefit of Survivorship, and in case neither of them should attain Twenty-one, or be married, then to re-transfer all such Stock to *Christian St. Barbe*, her Executors, Administrators, or Assigns.

Elizabeth Fielder died in 1808; and *Catherine* in 1809. The Bill prayed, that the £4875 and £1000 Stock might be transferred into the Name of the *Accountant-General*, upon the Trusts of the Appointment, and properly secured for the Benefit of the Plaintiffs, subject to *Christian St. Barbe's* Life Interest; and that the Trustees might be restrained from transferring the Stock without the Direction of the Court.

The Answers insisted, that the Power, given by the Testator's Will, was confined in its Objects to his Children: that under the Will his three Daughters took vested Interests, subject to their Mother's Power to vary the Amount of their Shares; but, as the Mother made no Appointment to them in their Life-time, she had no Power to make any Appointment after their Deaths: that the Power did not extend to Grand-children; and the Stock was unappointed: the Defendant *Randolph* insisting, that it was a Joint-tenancy in the three Daughters; and, as his Wife had survived her two Sisters, the whole

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became vested in her; and he, as her Administrator, was entitled to it.

Sir Samuel Romilly, and Mr. Roupell, for the Plaintiffs.

If the Power is not well executed, there is clearly a Tenancy in Common among the Daughters. This will be compared to the Case of Appointments by Will; which are certainly void for the Excess beyond the Power; for Instance as to Interests given to Grand-children under a Power to appoint to Children: Grand-children not being Objects of the Power: *Alexander v. Alexander* (a): but this Question has been decided in *Langston v. Blackmore* (b); and in *Alexander v. Alexander* the *Master of the Rolls* speaks to the same Effect (c): "the Mother had a Power " to do something similar to this, but in another Way; for " though that Power would have enabled her for better " Advancement in Marriage to make a strict Settlement, " that is implicitly contained in that Power to limit any " Share she thought fit to give for Advancement of Mar- " riage in that Way: but she has not taken that Method; " for she has made a Disposition of it by her Will; and " therefore it must correspond with every Circumstance in " that Will."

This Question was also clearly decided in *Routledge v. Dorril* (d); where Lord Alvanley states as to the Appointment, made on the Marriage of *Elizabeth Dorril*, that, where there is a Power to appoint among Persons, capable of such Appointment, and they come *in esse* at the particular Times to make the Appointment good, a Sum appointed, as in that Case to the Daughter, upon Marriage, though modified with respect to the Objects of

(a) 2 Ves. 640.

(b) Amb. 289.

(c) 2 Ves. 642.

(d) 2 Ves. jun. 357. See
Page 362.

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the Marriage, is a good Appointment, not to the Objects of the Marriage, but to the Daughter herself; and that Appointment was held a good Appointment to her; though, if it had been done by Will, and independent of any Modification, introduced by *Elizabeth*, the Daughter, it would not have been good; as the Husband, and the Children of the Marriage born after the Death of their Grandmother, were not immediate Objects of the Appointment. Therefore it was just as if it was appointed to her, and she had settled it so with the Husband.

That was precisely as Lord *Hardwicke* considered it in *Langston v. Blackmore*: but that was not, as *Routledge v. Dorril*, the Case of a Marriage then in Contemplation, but a Provision for any Wife the Son might afterwards marry, and Children by a subsequent Marriage. This therefore will be supported as an Appointment, not to the Grand-children, but to Mrs. *White* herself: the Intention in her Favor appearing upon the Deed; and her Children taking, not by direct Appointment, but under a Modification of the Property, letting them in, with the Consent of their Mother, an immediate Object of the Power. That certainly could not be done by Will; as is observed in *Alexander v. Alexander*; as that would be the sole Act of the Person having the Power; and the Interest would be taken directly under the Appointment by Persons, not Objects of it: but, where it is done by Deed, the immediate Object joining in the Act, and directing the Uses, all Objection is removed. From the Cases, that have been cited, Mr. *Sugden* (*a*) draws the same Conclusion, that in Equity a valid Appointment may be made to Persons, not Objects of the Power, with the Approbation of the real Object; and, though the Instance he puts, of such a Settlement upon the Marriage of a Child, is not applicable to this Case,

(*a*) *Sugden*, on Powers, 420.

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Mrs. *White* having been married before this Appointment, the Case of *Langston v. Blackmore*, which was upon a Settlement not in Contemplation of Marriage, shews, there is no such Distinction. This will therefore be sustained as an Appointment substantially to the Daughter, a proper Object of the Power; who, if the Appointment had been made directly to her, might the next Day with her Husband have made this Settlement.

Upon the Construction of the Will however it is not to be conceded, that Children only are the Objects of this Power: the Word "Family" extending to all Issue.

Mr. *Richards*, for Defendant, the Father of the Plaintiffs, who, as Administrator of his deceased Wife, had an Interest agaist them, but who had joined in the Appointment, declined arguing the Case.

Mr. *Leach*, and Mr. *Horne*, for the Defendant *Randalph*.

This is clearly a Power to appoint among Children. The Conclusion, attempted to be drawn from the accidental Introduction of the vague Word "Family" supposes a Change of Intention, before the Testator came to the End of the Will; clearly in the former Part pointing to Children; to which the Word "Family," as here used, must be considered synonymous; and the Court will not imply Contradiction from Expressions, that may be reconciled.

As to the second Question, whether this is to be considered as an Appointment to a Child, or to Grand-children, the Principle of the Cases cited is, that the Appointment was a direct Gift to the Child; who was competent to make that Settlement, carving out of it an Interest for the

the Children of that Child. The Distinction of this Case is, that the Daughter had not the Capacity of making a Settlement; as this was, not a present Interest, which she and her Husband might have settled, but an Interest in Remainder, expectant on the Death of her Mother; which they were not competent to deal with. The Author of this Power expresses his Object, personal to the Children, to secure their good Behaviour; and the Court will not without clear Words extend it beyond the Reason assigned. The Interests are vested, subject to be devested by a proper Appointment; and this Instrument cannot be separated; taking it first as an Appointment, and secondly as a Declaration of Trust,

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Sir Samuel Romilly in Reply observed, that this was just such a Settlement as the Court would have directed; and, though, it is true, the Wife had not the Power of making such a Settlement, if an Appointment had been made to her, the Husband could have done it.

*The MASTER of the ROLLS (preventing farther Reply.)*

The last Argument, that the Appointment and Settlement was all one Act, and could not be separated, by considering it first as a good Appointment, and secondly, a Declaration of Trust, would have applied equally in the Cases cited; for there was no direct Appointment to the Child, and afterwards a Settlement: but it was one Act; putting the whole into Settlement at once by Consent of all the Parties.

Why could not the Husband in this Case make the Settlement? A Husband can dispose of such Property of his Wife in Expectancy against every one but the Wife surviving; and this is just such a Settlement as the Court would have directed. The Question is, whether all Par-

Husband can dispose of his Wife's Property in Expectancy against every one but the Wife surviving.

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ties, having any Power over the Fund, have not concurred in this Disposition of it. The Wife could make the Appointment; and the Husband could make the Settlement; and he is a Party to the Deed. It falls precisely within the Principle of *Routledge v. Dorril* and *Langston v. Blackmore*.

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The Decree was made according to the Prayer of the Bill.

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### PENNINGTON v. PENNINGTON.

Construction  
of a residuary  
Devise, as in-  
cluding under  
the general  
Words "Estate  
"and Effects" a  
Copyhold, not  
surrendered, in  
Favor of a  
younger Son,  
subject to  
Debts, the Will  
reciting, that  
the eldest Son  
was provided  
for; and no  
Freehold Es-  
tate.

SIR John Pennington, Baronet, by his Will, dated the 20th of April, 1792, giving certain Annuities, which he directed should be issuing out of his Manors, &c. situate in the County of York, subject thereto, devised all his Manors, &c. to Trustees, to the Use of his Son Lord Muncaster and his Issue in strict Settlement, with Remainders to his Son Lowther Pennington and his Issue in strict Settlement, with Reversion to the Testator's right Heirs for ever; and after giving some specific Legacies, the Will proceeds as follows:

" And as to all the Residue and Remainder of my Estate and Effects not hereinbefore by me disposed of after Payment of my just Debts and Funeral Expences with the due Payment whereof I hereby charge all my Estate and Effects as well real as personal and subject thereto

" thereto I give devise and bequeath the same and every  
 " Part thereof unto my said Son *Lowther Pennington* his  
 " Heirs Executors and Administrators according to the  
 " Nature of such residuary Estates having already amply  
 " provided for my said Son *Lord Muncaster* out of my  
 " Estates in the several Counties of *Cumberland, West-*  
 " *moreland and Lancaster.*"

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The Bill was filed by a Bond Creditor; who was also one of the Annuitants, and a specific Legatee in the Will.

The Master's Report stated, that the Testator died, seised to him and his Heirs of a Copyhold Estate; which was not surrendered to the Use of his Will; and therefore according to the Custom of the Manor descended to Lord *Muncaster*, as the eldest Son and Heir; and that the Testator did not die seised of any other real Estate than that, which was devised, and limited in strict Settlement by his Will. The Questions were, whether the Copyhold Estate passed under the residuary Clause to *Lowther Pennington*; and whether it was the Fund, out of which the Plaintiff's Debt was to be paid.

Mr. Richards, and Mr. Hall, for the Plaintiff: Mr. Hart, and Mr. Roupell, for the Defendant *Lowther Pennington*.

It cannot be contended, that the Annuitants, the specific Devisees, or those, to whom the real Estates are given in strict Settlement, ought to contribute to this Debt; which ought to fall on this Copyhold Estate, passing in Equity, though not at Law, under the residuary Clause. It appears by the Master's Report, that the Testator had no real Estate whatever, except that, which he has limited in

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strict Settlement. There is nothing, therefore, but this Copyhold to satisfy the Words of the residuary Clause; though if there had been any Freehold Estate to satisfy that Clause, the Construction must have been different. The Cases upon this Subject, which are very numerous, establish this Proposition, that the Terms "real Estate" shall carry Copyholds, where there is no Freehold Estate: *Bullock v. Bullock* (*a*), *Ross v. Ross* (*b*), *Ithell v. Beane* (*c*), *Byas v. Byas* (*d*), *Lindopp v. Eborall* (*e*), *Drake v. Robinson* (*f*), *Judd v. Pratt* (*g*), and *Church v. Mundy* (*h*). The Proposition, that the Heir shall never be disinherited but by express Words or necessary Implication, does not stand in the Way: the Testator having indicated, that he had amply provided for Lord Muncaster; who was his Heir at Law; and the Language of the residuary Clause being sufficiently strong to disinherit the Heir as to the Copyhold in question.

If against an Heir unprovided for this Court will not supply a Surrender, it will for a younger Son, provided for, if the Heir also has a Provision. That a Provision for the younger Son makes no Difference is expressly decided in *Cook v. Arnham* (*i*).

Sir Samuel Romilly, and Mr. Bell, for the Defendant Lord Muncaster.

There is an evident Distinction between the Cases of Children and Creditors: in the former the Freehold Estate,

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| ( <i>a</i> ) 6 <i>Vin. Ab.</i> pl. 19.                       | ( <i>f</i> ) 1 <i>P. Wms.</i> 443.                          |
| ( <i>b</i> ) 1 <i>Eq. Ca. Ab.</i> 124, pl.<br>14 (Ed. 1739.) | ( <i>g</i> ) 13 <i>Ves.</i> 168, and 15<br><i>Ves.</i> 390. |
| ( <i>c</i> ) 1 <i>Ves.</i> 215.                              | ( <i>h</i> ) 12 <i>Ves.</i> 426, and 15<br><i>Ves.</i> 396. |
| ( <i>d</i> ) 2 <i>Ves.</i> 164.                              | ( <i>i</i> ) 3 <i>P. Wms.</i> 383.                          |
| ( <i>e</i> ) 3 <i>Bro. C. C.</i> 188.                        | whatever                                                    |

whatever its Value, satisfy the Intention; but as to the latter the Amount of the Debts is to be considered in providing a Fund for their Liquidation (*a*). This is not the Case of a Surrender to be supplied for Creditors, the Property, not specifically devised, being more than sufficient to answer the Debts. The only Question is, whether the Testator has by the residuary Clause devised his real Estate; and it cannot be maintained, that he has. The only Effect of that Clause is to bequeath his personal Property to *Lowther Pennington*. The Expression "the "same and every Part thereof" applies only to the "Estate "and Effects," the Disposition of which begins the Clause, and not to the Terms "real and personal," on which he had charged his Debts, &c.; and the Words "according to the Nature of such residuary Estates" were probably used without any definite Meaning. Though the Word "Estate," standing alone, has with reference to the Context, been held to carry real Estate, yet, when coupled with "Effects," it has been always confined to personal Property. The Argument, that here is no real Estate to satisfy the residuary Clause, is opposed by the ultimate Reversion of the Estates, devised in strict Settlement.

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### *The MASTER of the ROLLS.*

This appears to me to be a plain Case. The Clause, I agree, is to be read with an Exclusion of the Parenthesis; for the Words "the same" refer not to "all my "Estate and Effects as well real as personal," but to "the "Residue and Remainder of my Estate and Effects not

(*a*) See as to this Distinction Lord C. Eldon's Judgment in *Judd v. Pratt*, 15 *Ves.* 394, the Argument in

*Church v. Mundy*, 15 *Ves.* 397, and the Cases there referred to, of *Byas v. Byas*, and *Lindopp v. Eborall*.

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" hereinbefore by me disposed of." Stopping here, there might be some Ambiguity from coupling the Word " Estate" with " Effects :" but upon the whole of the Clause there is no fair Doubt of the Meaning : " And as to " all the Residue and Remainder of my Estate and Effects " not hereinbefore by me disposed of after Payment of " my just Debts and Funeral Expences, (with the Pay- " ment whereof I hereby charge all my Estate and Effects " as well real as personal) and subject thereto I give " devise and bequeath the same and every Part thereof " unto my said Son *Lowther Pennington* his Heirs " Executors and Administrators according to the Nature " of such residuary Estates." That is, he gives his re- siduary Estates, of different Natures. The Devisee and his Heirs are to take some : the Devisee and his Executors, others, according to their respective Natures. He must have intended to include all, whether real or personal, in this residuary Clause.

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Devise of Free-
hold Estate in
Trust to sell and
apply the Mo-

MAUGHAM v. MASON.

CHARLES Pryor, being seised of Freehold Chambers in *Lincoln's Inn*, by his Will, dated the 16th of March, 1774, devised them to Trustees and their Heirs, money towards Payment of the Legacies : the Residue of the personal Estate after Payment of Debts, Legacies, &c. upon Trust to convert all the said Residue of his personal Estate into ready Money, to be laid out in Freehold Property, to be settled.

The personal Estate leaving a Residue beyond the Charges, the real Estate a resulting Trust for the Heir at Law ; and charged with the Legacies, not primarily, but only as an auxiliary Fund to the personal Estate.

upon

upon Trust to sell, and to apply the Money arising by such Sale "towards" Payment of the Legacies, by his Will bequeathed; and the Rents and Profits thereof, until sold, to be applied to the same Uses; and after giving Two pecuniary and some specific Legacies as to for and concerning all the rest, Residue, and Remainder, of his personal Estate of what Nature or Kind soever, after Payment of his just Debts, Legacies, and Funeral Expences, he bequeathed the same unto his Trustees, their Executors, Administrators and Assigns, upon Trust to convert all the said rest and Residue of his personal Estate into ready Money, and to lay out the same in the Purchase of Freehold Property; which the Trustees were to settle during the natural Life of the Testator's Niece *Cecilia*, the Wife of *John Maugham*, upon Trust for her separate Use, with Remainder to her Sons in Tail-male in strict Settlement and Remainders over. He appointed his Trustees Executors.

The Executors paid all the Debts, Funeral Expences, and Legacies, out of the personal Estate; not making Sale of the Chambers; and leaving a Surplus of £580 Stock, the Residue of the personal Estate.

The Plaintiff, the Grandson of *Cecilia Maugham*, deceased, claiming under the Limitation to her Sons in Tail-male, filed the Bill; praying, that the Freehold Chambers might be sold; and the Produce together with the £580 Stock laid out in the Purchase of Lands, to be settled according to the Directions of the Will.

The Heiress at Law of the Testator submitted by her Answer, that, if the Court should be of Opinion, that the Freehold Chambers were liable to make good the Legacies,

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Legacies, they were liable only to the Extent of the Deficiency of the personal Estate; and if such Freehold Estate was primarily liable to pay the Legacies, then she claimed to be entitled to the Surplus.

Mr. Richards, and Mr. Lovat, for the Plaintiff.

There are Two Questions: first, whether the Chambers are not converted out and out into personal Estate: secondly, whether the Chambers are not primarily liable to pay the Legacies. With respect to the first Point, this is not a Question between the Heir, and the next of Kin, but between the Heir, and the residuary Legatee: a Distinction, expressly taken in the learned Argument of *Ackroyd v. Smithson* (*a*) founded in the Difference between the Case of Intention apparent, and the Absence of Intention.

Secondly, this Testator, as in *Hancox v. Abbey* (*b*), clearly indicates, that the Chambers should be the first Fund for Payment of his Legacies; and the Introduction of the Word "Legacies" in the residuary Clause is not inconsistent with this Construction; proceeding on the Presumption, that the Produce of the Chambers might not be sufficient. There is no Pretence for considering this a Charge upon the Chambers merely to supply the Deficiency of the personal Estate: it is both in Terms and Substance a Devise in the first Instance to pay the Legacies; and though the Testator uses the Word "towards" his Meaning is "in" Payment. If any Reliance is placed on the Word "personal" in the residuary Clause, that Word is to be found also in *Mallabar v.*

(*a*) 1 Bro. C. C. 503, see (*b*) 11 Vcs. 179.
particularly 507 to 512.

Mallabar,

Mallabar (a), and in *Durour v. Motteaux* (b); as appears by the Register's Book (c); and that Will had no such Words as "and Performance of my Will," or any other Expression more favorable to the residuary Legatee. So the Words "personal Estate" in the residuary Clause of this Will must be understood not merely the personal Property in a strict Sense, but as comprising also the Produce of this real Estate.

Mr. Leach, and Mr. Wingfield, for the Heiress at Law.

If any Distinction really exists between the Cases of next of Kin and residuary Legatee, contending with the Heir at Law, it is difficult to assign a Reason for it, that will be satisfactory and consistent with the settled Rule, that the Heir shall never be disinherited but by express Words or necessary Implication. The Cases of *Mallabar v. Mallabar* and *Durour v. Motteaux* turned upon the peculiar Expressions used in those Wills; creating a compleat Conversion out and out, turning the Whole into personal Property; and the Word "Residue", therefore, applied to both. This Charge on real Estate, merely "towards" Payment of the Legacies, falls under the common Principle, that a Gift to a certain Extent, not

(a) *For.* 78.

(b) *1 Ves.* 320.

(c) Mr. Lovat stated this Will from the Register's Book thus: The Testator gave all his real and personal Estate (by the Description of all his Lands, Tenements, and Hereditaments, Stock in Trade, Debts, &c.) to Trustees upon Trust to sell and dispose

thereof, and thercout to pay all the Testator's Debts and Funeral Expences and the Legacies and Gifts by the said Wiil given, and place out and invest the *Residue* of his "Personal" Estate upon Securities, and dividé among several [Persons.—Reg. Lib. 1749, Book A, Fol. 253.

exhausting

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exhausting the whole beneficial Interest, leaves a resulting Trust for the Heir at Law (*a*). The real Estate is not primarily liable. The Case of *The Duke of Ancaster v. Mayer* (*b*) has settled, that a mere Charge on the real Estate will not exonerate the personal Estate; which is not exempted, but only receives Aid from the real Estate. The Words of this Will are not stronger; and call for no different Construction. Another settled Rule is, that where there is a Charge on both Funds, the real Estate shall never be held primarily liable; exempting the natural Fund, the personal Estate. In *Hancor v. Abbey* the general Rule was admitted; but that Case was taken out of it by the Intention indicated as to the £2000.

### **Mr. Richards, in Reply.**

There is a solid Difference between the Cases of the next of Kin, and the residuary Legatee, conflicting with the Heir: the residuary Clause raising the Inference, which the other Case wants, that the Heir was disinherited. The Intention, clearly indicated, must, as in *Mallabar v. Mallabar* and *Durour v. Motteaux*, give the Surplus to the residuary Legatee: but taking this not to be a Conversion out and out, it is a Devise for a particular Purpose, and within *Hancor v. Abbey*.

### **The MASTER of the ROLLS.**

Two Questions were made in this Cause: first, whether the real Estate is not so absolutely converted into personal as to pass by the residuary Clause under the Denomination of personal Estate: secondly, whether, if it does not so

(*a*) See *Hill v. Cock*, *Ante*, 173, and *King v. Denison*, *Ante*, 261.

(*b*) 1 Bro. C. C. 454.

pass, it be not at least the primary Fund, out of which the Legacies are to be paid.

The Testator directs his Trustees to sell his Chambers, the only real Estate he is stated to have had, and to apply the Money, arising by such Sale, towards Payment of the Legacies by his Will, bequeathed. Stopping here, it would be impossible to contend, that what remains after Payment of the Legacies, would not be a resulting Trust for the Heir; no Disposition being made of the Surplus Produce of the Sale after Payment of the Legacies; and no Purpose being expressed, for which the Sale is directed, beyond Payment of them.

The Testator then gives some specific Legacies of Stock; which of course cannot be the Legacies, to which the Produce of the Sale of the real Estate is to be applied. There are only Two pecuniary Legacies; one of £1000; and Twenty Guineas to one of his Executors. Of Two Stock Legacies, given only for Life, he directs the Trustees upon the Death of each Legatee to sell the Capital; and to lay out the Produce in Freehold Lands and Tenements, to be settled to the same Uses as the Lands afterwards directed to be purchased with the rest and Residue of the personal Estate. The residuary Clause is thus expressed:

" And as, for and concerning, all the rest, Residue, and Remainder, of my personal Estate of what Nature or Kind soever after Payment of my just Debts, Legacies and Funeral Expences," he bequeathed to his Trustees, their Executors, &c. upon Trust, to convert all the rest and Residue of his personal Estate into ready Money, and to lay out the same in the Purchase of Freehold Property; which the Trustees were to settle; and then he proceeds to declare the Trusts.

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Properly nothing is the personal Estate of a Testator, that was not so at his Death: he may so express himself as to shew something else intended; but where there is nothing but a Direction to sell Land with an Application of the Money to a particular Purpose, there is no Instance of holding the Surplus, after that Purpose answered, to form Part of the personal Estate, so as pass by the residuary Bequest.

The Observation is perhaps minute, that the Money, produced by the Sale of the real Estate, could not with propriety be spoken of as personal Property to be converted into Money: at most however this is a general Bequest of the Residue of his personal Estate; and the Question is, what was meant to be included under that Description. Properly speaking nothing is the personal Estate of a Testator, that was not so at his Death. He may certainly so express himself as to shew, that something else was intended: but, where there is nothing but a Direction to sell Land, with Application of the Money to a particular Purpose, and a subsequent Bequest of the rest and Residue of the personal Estate, I know of no Case, in which it has been held, that the Surplus, after the particular Purpose is answered, forms Part of the personal Estate; so as to pass by the residuary Bequest. The mere Disposition of the Residue of personal Estate can never solve the Question, what is personal Estate. The Clause may be so conceived as to shew the Sense, in which those Words are used: but here is nothing more than those Words, unaccompanied with any Thing explanatory of the Sense, in which they were used.

It must therefore be contended broadly in this Case, that, wherever a Will contains a Direction to sell real Estate, and also a residuary Bequest of personal Estate, there can be no resulting Trust for the Heir.

The Cases of *Mallabar v. Mallabar* (*a*) and *Durour v. Motteaux* (*b*) have never been understood to establish any such Proposition. In the former, though those Two Circumstances concurred, they were not relied upon either in the Argument or the Decision. Lord Talbot at first resorted to parol Evidence; but afterwards, thought, the Intention might be satisfactorily collected from the Will itself.

(*a*) *For.* 78.

(*b*) *1 Ves.* 320.

*Durour*

*Durour v. Motteaux* does not perhaps furnish so strong an Indication of Intention. From the little Lord Hardwicke is reported to have said it is difficult to ascertain, from what Expressions he inferred, that by the Description of all his personal Estate the Testator meant to include every Thing in the Residue. If any Stress is to be laid upon the Word "all," that Word does not occur here: but that Decision is generally accounted for by the particular Manner, in which the Sale was directed, and the Circumstance of the Testator's having blended together the real and personal Estates in one Gift to Trustees, to sell the whole with his personal Estate, &c.

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The blending the two Estates together has always been considered as furnishing an Argument for the entire Conversion of the real into personal: an Argument, which is wholly wanting in this Case. It was observed (by Mr. Lorat) that this Circumstance cannot be considered as very decisive of the Intention either Way; as, though they were blended together in *Ackroyd v. Smithson* (a), yet the Heir succeeded in his Claim. There the Question was, not, whether the Testator meant to dispose of real Estate as Personality; for he had done so in express Terms; but, whether it was to be converted for any other Purpose than the precise Disposition expressed. That Case decides, that it is not in every Instance, where the Estates are blended, that the Heir is excluded; but not, that without that Circumstance, or some equivalent Indication of Intention, the Claim of the residuary Legatee can prevail. The Want of a Circumstance may be very material in the one Way; although the Existence of it would not be decisive in the other. I can find nothing in this Will, that furnishes a sufficient Indication of the Intention of the Testator to make an absolute Conversion of his real into personal Estate.

(a) 1 Bro. C. C. 503.

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As to the other Question, I do not see, how it can possibly bear an Argument: so numerous are the Cases, in which much stronger Words have been held insufficient to exempt the personal Estate, or to make the real primarily liable. Some Stress was laid on the Circumstance, that it is towards the Payment of Legacies only that the Produce of the real Estate is to be applied. From a Direction to pay a particular Debt, or a particular Legacy, in Contradistinction to other Debts and other Legacies, the Argument, used in *Hancor v. Abbey* (a), may fairly enough arise, but where it is to pay Debts generally, or Legacies generally, there is no Room for its Application. Although in the subsequent Part of his Will the Testator gives only two pecuniary Legacies, of any Amount, yet, if he had given ever so many, they would all have been equally charged on the real Estate; but charged in Aid of the Personal; and not in Exclusion of it, or in Priority to it.

Upon both Points therefore my Opinion is in favour of the Heir at Law.

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The Bill was dismissed without Costs.

(a) 11 Ves. 179.

LORD

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LINCOLN'S  
INN HALL,  
Feb. 22.

## LORD MILSINGTOUN v. EARL OF PORT-MORE.

THE Plaintiff having obtained an Injunction without serving the Defendant with a Letter Missive and Office Copy of the Bill, a Motion was made to dissolve the Injunction; or that the Plaintiff might be directed at his own Expence to furnish the Defendant with an Office Copy of the Bill.

Mr. Hart, Mr. Leach, and Mr. Hall, in support of the Motion.

The Defendant is not bound to put in an Answer, until he has been served with a Letter Missive, and an Office Copy of the Bill; and this Injunction having issued without either is a Nullity.

It may be questioned, whether this is not a Breach of Privilege. The Privilege of Peerage, limited as it is by modern Statutes (*a*), still requires, as an indispensable Condition, Service of the Letter Missive, and Copy of the Bill, accompanying at least, if not preceding, any Order of the Court; and in this Respect there is no Distinction between an English and a Scotch Peer: the Privilege attaching to the Defendant as a Peer; not as a Member of the Upper House of Parliament. *Robinson v. Lord Rokeby* (*b*) has decided, that Irish Peers, with the Exception of those in the House of Commons, are entitled to every Privilege of the Peerage, except that of

The Right to the Letter Missive and Copy of the Bill is Privilege of Peerage, not of Parliament: attaching therefore to all Scotch and Irish Peers.

Injunction therefore, or other Process, not so accompanied, is ineffectual.

(*a*) Stat. 12 and 13 Will.      (*b*) 8 Ves. 601.

3. c. 3. Stat. 11 Geo. 2.  
c. 24.

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sitting in the House of Lords (*a*): and therefore to the Letter Missive.

Sir Samuel Romilly, for the Plaintiff, said, the Application in *Robinson v. Lord Rokeby* was not opposed: and Orders had been frequently made, that upon the Service of an Injunction on a Peer a Letter Missive should accompany it.

*The Lord Chancellor.*

This is Privilege of Peerage, not Privilege of Parliament. In this Respect therefore there is no Distinction between English, Scotch, and Irish, Peers: all being entitled equally to Privilege of Peerage; though only those, who are in Parliament, can have Privilege of Parliament. In both the Acts of Union the Peers in Parliaments, the 16 and the 48, have the same Privileges as the English Peers; with the Exception of those, who did not take the Oaths; with regard to whom there was a considerable Question as to their franking.

If they have the same Privilege of Peerage, though not of Parliament, what is their Privilege as to this Question? With regard to that I am bound to consider every Peer entitled to this Privilege, who does not, as many do, voluntarily waive it. The Question then is as to the Effect of the Injunction. I doubt, whether it has any Validity, unless accompanied with the Letter Missive and a Copy of the Bill. I will consult the *Master of the Rolls* upon it: but at present I think, I ought not to make the Order; conceiving the Injunction to be good for nothing. If a Peer is entitled to an Office Copy of the Bill, and insists upon it, I do not see, how this Court can make any Process effectual against him, until that is done. I had taken

(*a*) See Stat. 39 and 40 Geo. 3. c. 67.

it,

it, that this Practice was much older than the Statute of William 3. The Letter Missive and Copy of the Bill I take to be very antient. There is one Instance of it in a very early Stage of the *Banbury Case.*

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Sir Samuel Romilly, for the Plaintiff, then waived the Point ; and consented to serve a Copy.

Before

*The Lord  
Chancellor.*

1812,

*Feb. 25, 26.*

With the Judges

1812,

*June 15. 19.*

26. 29.

1813,

*Feb. 10.*

*March 1.*

*April 13.*

Under a De-

vise by a mar-  
ried Man, hav-  
ing no legiti-  
mate Children,

" to the Chil-  
dren which I

" may have by

" A. and liv-

" ing at my

" Decease,"

natural Chil-

dren, who had

acquired the

Reputation of

being his

Children by

her before the

Date of the Will, entitled,

as upon the whole Will intended, and suf-

ficiently described ; rejecting, as a Description of the Devisees, Passages

in a written Book, unattested ; of which Probate was admitted under

a Reference in the Will to " the Observations and Directions, which

" I shall leave in a written Book."

Whether, if there were also legitimate Children by the same Mother,

they could take together under the same Description, and whether

future illegitimate Children can take under any Description in a Will,

Quare.

### WILKINSON v. ADAM.

*The Lord CHANCELLOR.*

Sir ALEXANDER THOMPSON, Baron.

Sir SIMON LE BLANC, } Justices.

Sir VICARY GIBBS, }

*JOHN Wilkinson* by his Will, dated the 29th of November, 1806, devising to his Wife *Mary Wilkinson* for Life his Mansion at *Castle Head*, and declaring, that such Devise, together with the Annuity given to her, was to be taken in lieu of Dower, and giving her an Annuity of £500, charged on his real Estates and Iron Works thereafter devised, and also giving her the Use of his Household Goods, &c. at his Mansion at *Castle Head*, proceeds as follows :

" And from and after the Decease of my said Wife I give and devise unto *Ann Lewis* (who now lives with me) during the Term of her natural Life provided she so long continues single and unmarried but not otherwise all that my said Mansion House at *Castle Head* with the Appurteances. Also I give and devise to the said *Ann Lewis* (subject to the Proviso aforesaid) the Use of

the Appurteances. Also I give and devise to the said *Ann Lewis* (subject to the Proviso aforesaid) the Use of

Whether, if there were also legitimate Children by the same Mother, they could take together under the same Description, and whether future illegitimate Children can take under any Description in a Will, Quare.

" all

" all my Household Goods, Plate, Furniture, and other  
 " Chattels of what Kind soever, being at my Mansion  
 " House at *Castle Head* aforesaid for her Life which  
 " Devises are for the separate and peculiar Use Benefit  
 " and Enjoyment of the said *Ann Lewis* during the Term  
 " and on the Proviso aforesaid and are to be looked upon  
 " as entirely distinct from and having no Reference to the  
 " joint Trust wherewith she is hereinafter intended to be  
 " invested by this my Will."

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~~  
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The Testator then devises all his real and personal Property (except what he had before given to his said Wife and *Ann Lewis* for their respective Lives) to the said *Ann Lewis*, *James Adam*, *William Vaughan*, *Cornelius Reynolds*, and *Samuel Fereday*, for Thirty-one Years, to commence from his Decease, upon several Trusts ; the last of which is to purchase Lands of Inheritance ; to be limited during the Term of Thirty-one Years to such and the same Uses, and upon the same Trusts, with those of the Testator's Estates of Inheritance, thereby devised to them in Trust ; and he then proceeds in the following Words :

" And from and after the Expiration of such Term to  
 " the Children which I may have by the aforesaid *Ann*  
 " *Lewis* and living at my Decease or born within Six  
 " Months after equally to be divided between such Children  
 " and their Heirs Share and Share alike and if but one such  
 " Child to such only Child and his or her Heirs for ever ;  
 " and if no such Child or Children be living at my Death  
 " or born within Six Months after my Decease, as afore-  
 " said, to my Nephew *Thomas Jones* and his Heirs for  
 " ever ; and if the said *Thomas Jones* shall at the Time  
 " of such Purchase be dead, in that Case to such  
 " Person as shall be the Heir of the said *Thomas Jones*,  
 " and to his, her or their, Heirs for ever ;" and after the  
 Expiration of the said Term of Thirty-one Years he

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devised all other his Estates, &c. in the following  
Words:

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" To the Use and Behoof of the Child or Children  
" which I may have by the said *Ann Lewis* as above  
" mentioned to be divided equally between them Share  
" and Share alike, and his, her or their Heirs for ever; and  
" in Default of such Child or Children born to me as  
" aforesaid, then to the Use and Behoof of my said  
" Nephew *Thomas Jones* and his Heirs for ever provided  
" he or they do take the Name of *Wilkinson*; and in  
" case I leave any Child or Children by the said *Ann*  
" *Lewis* then I give and bequeath to my said Trustees for  
" each and every such Child *per Year* during the Conti-  
" nuance of the said Term of Thirty-one Years such a  
" Sum of Money as they or the major Part of them in  
" their Discretion shall think adequate and sufficient for  
" the Support Maintenance Education and bringing up of  
" such Child or Children which I may have by the said  
" *Ann Lewis* as aforesaid during so long of the said  
" Term as he she or they may happen to live but not to  
" exceed the Sum of £200 in each Year for each and  
" every such Child or Children; and it is my Will and I  
" do hereby expressly limit give and appoint the said Sum  
" of £200 *per Year* to the said *Ann Lewis* for her own  
" peculiar and separate Use for her Care Management and  
" Guardianship of the said Children during such Time as  
" she continues such Guardianship; and I charge my  
" Estates with the Payment thereof accordingly."

After directing, that his Trustees should at the Expiration  
of the said Term of Thirty-one Years, render an Account  
to the Persons then entitled in Reversion or Remainder to  
his several Estates of Inheritance so devised or purchased,  
and assign and deliver his Leasehold and personal Pro-  
perty, he proceeds thus;

" And

" And it is my Will and I do hereby direct that immediately after the Expiration of the said Term of Thirty-one Years all my real and personal Estate and Effects not hereinbefore by this my Will otherwise disposed of shall be vested in the Child or Children which I may have by the said *Ann Lewis* as above-mentioned (except such Part thereof as is before devised to the said *Ann Lewis* for her own Use during her natural Life and continuing single and unmarried) and his her or their Heirs for ever Share and Share alike and in Default of such Child or Children born to me as aforesaid then the same to vest in the said *Thomas Jones* his Heirs Executors Administrators and Assigns to his and their own Use upon the Condition aforesaid. And it is my Will and I do hereby farther direct that immediately on the Decease or Marriage of the said *Ann Lewis* (which shall first happen) the Mansion House at *Castle Head* and also the Household Goods and Furniture so devised to her aforesaid shall vest in my said Child or Children born to me by her as aforesaid equally between them and in Default of such Issue then to the said *Thomas Jones* his Heirs Executors Administrators and Assigns upon the Condition aforesaid."

The Testator then appointed *Ann Lewis* Executrix, and his other Trustees Executors of his Will; and having directed the Legacies, in a Schedule, annexed to his Will, to be paid, requests, that his Body may be privately interred in his Garden at *Castle Head* in a Place, prepared for that Purpose, or within a Building called the Chapel at *Brymbo*, or in his Garden at *Bradley*, " in such Manner as is directed in the Book hereinafter referred to, and at the nearest of the said Places where I shall happen to die. Lastly it is my earnest Wish and Desire that the Observations and Directions which I shall leave (in a written Book) for the better Improvement of my Estates " and

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“ and carrying on the different Works as well as other  
 “ Matters be followed and attended to as much as if they  
 “ were inserted in this my Will.”

The Will was re-published on the 26th of *March*, 1807, and the 5th of *January*, 1808: in each Instance in the Presence of Three subscribing Witnesses; and on the latter Occasion, he added a Codicil; directing, that the Term of the Trust should be for Twenty-one Years from his Decease instead of Thirty-one Years.

On the 6th of *January*, 1808, the Testator added another Codicil substituting *William Smith* in the Place of *Reynolds* as a Trustee and Executor; and at the same Time he re-published his Will; in each Instance stating, that he re-published “ the Contents of this and “ the preceding” Eight or Nine Sheets as and for his last Will and Testament.

The Testator died in *July*, 1808; and upon his Death a Manuscript Book was found; containing with a great Variety of other Matter Eight Entries, not attested so as to pass real Estates, but which were proved in the Prerogative Court of *Canterbury* as testamentary. Some of those Entries were as follows:

“ Register of my Children by *Ann Lewis* which for  
 “ more certainty is entered by *John Wilkinson*; *Mary*  
 “ *Ann*, born *July 27th*, 1802, about Eleven o’Clock;  
 “ *Jonina*, born *August 6th*, 1805, about Four o’Clock;  
 “ *John*, born *October the 8th*, 1806, Half past Eight  
 “ o’Clock in the Morning.”

“ *Bradley*, *March 26th*, 1807. Whereas in my last  
 “ Will and Testament re-published this Day it is limited  
 “ that the Child or Children which should be entitled to  
 “ Co-shares

" Co-shares of my Estate real and personal as is more  
 " fully explained there should be born to me of the  
 " Body of *Ann Lewis* within Six Months of my Decease.  
 " Now I do hereby declare that such Limitation as to  
 " Time should not operate absolutely to the Deprivation  
 " of any Child or Children which may be born of the  
 " Body of the said *Ann Lewis* within the utmost Bounds  
 " (after my Decease) prescribed by Law for Gestation  
 " and I therefore hereby authorize my said Trustees to  
 " make such Provision for such Child or Children, if any  
 " such there be, as they or the major Part of them may  
 " think right according to the Circumstances of the Case;  
 " and farther least Doubts should arise as to the Express-  
 " sion ' Children born to me by the said *Ann Lewis*' I  
 " hereby declare that my Meaning is to include a Daughter  
 " of said *Ann Lewis* called *Mary Ann*, now about Five  
 " Years old, another Daughter of the said *Ann Lewis* called  
 " *Jonina*, now about Two Years old, and a Son of the said  
 " *Ann Lewis* called *John*, about Six Months old; and  
 " farther; whereas in my said Will it is expressed that the  
 " said *Ann Lewis* should have for her own peculiar and  
 " proper Use £200 during the Time of her Guardianship  
 " of my said Child or Children my Intention was and is  
 " that such Annuity should continue to her during her  
 " natural Life provided she remains so long unmarried in  
 " the same Manner as my Bequest to her of my Mansion  
 " House and Appurtenances at *Castle Head* and on pre-  
 " cisely the same Conditions; my Idea being at the Time of  
 " making my Will that she should be considered the  
 " natural Guardian of her Children during Life. This  
 " Explanation is therefore given to prevent a different  
 " legal Construction being put on that Term or Express-  
 " sion."

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" Bradley, 4th June, 1808. Memorandum. Whereas  
 in my last Will and Testament duly published mention  
 " is

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" is made of *Ann Lewis* as the Guardian of my Children
 " by her the said *Ann Lewis*, which Expression is only to
 " be understood as a Mark of my Regard for her and
 " Wish that such Children should not be taken from her
 " during their tender Age for any Purpose but that of
 " Education, nevertheless my Intention and Will is
 " that in all Things of Importance and particularly in the
 " Education of such Children described by the Names of
 " *Mary Ann, Joxina* and *John*, or any other Children
 " which may be born of the Body of the said *Ann Lewis*
 " as in my Will particularly described the Direction and
 " Management should be in my said Trustees, the Survivors
 " of them, and of such new Trustees as may be appoint-
 " ed pursuant to my said Will and may choose to act, any
 " Thing in my said Will to the contrary in anywise not-
 " withstanding; and farther, I hereby express my Will
 " and Desire that my said Children may assume and take
 " the Name of *Wilkinson* in addition to their present
 " Name of *Lewis*, and that my Trustees would take such
 " Steps for that Purpose as may be requisite; and
 " whereas, in my Will I have mentioned that after my
 " Decease my Body should be buried at *Castle Head*,
 " *Bradley* or *Brymbo*, or such of those Places as I should
 " happen to be at or nearest to the Time of my Decease,
 " it is not to be understood that I hereby determine the
 " final Place of depositing my Corpse; but if I do not die
 " at *Castle Head* my Body in one of the Iron Cases pro-
 " vided for that Purpose shall be removed thither by the
 " first convenient Opportunity there to remain."—Signed
 " *John Wilkinson.*"

The Testator's Wife, who died in his Life-time, in December, 1806, having never had any Children, he left *Mary Ann* and *Eliza Wilkinson*, the Children of his Brother, his Co-heiresses at Law; and his Nephew and Devisee *Thomas Jones*; who took the Surname of *Wilkinson*

kinson, and filed the Bill; alledging, that *Ann Lewis* was never married to the Testator; and any Children she had by him were illegitimate; and praying, that the Will and Two Codicils may be established; and the Trusts thereof carried into Execution: that the Trustees may be decreed to convey to the Plaintiff and his Heirs the real Estate of the Testator, subject to the Estate and Interest of *Ann Lewis*; &c.

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The Trustees by their Answer alleged, that the Testator previously to the Execution of his Will at Three several Times caused to be written in a certain Book certain testamentary Papers, containing Directions for the Improvement and Management of his Affairs after his Death; and on the Day of the Date of his Will he wrote another testamentary Paper in such Book; which Four testamentary Papers were proved in the Ecclesiastical Court as Codicils; that by his Will he referred to such written Book: that he left Three other Codicils in such Book; the first made soon after his Will: the second bearing Date the 26th of March, 1807: and the third dated the 4th of January, 1808: all which together with another Codicil, dated the 31st of January, 1808, written in such Book, had been proved in the Ecclesiastical Court: that the Testator acknowledged *Mary Ann Wilkinson*, *Jonina Wilkinson*, and *John Wilkinson*, to be his Children; and frequently declared, that he had provided for them by his Will as such. The Defendant *Ann Lewis* stated, that she cohabited with the Testator for many Years previous to and at the Time of his Death; and their Cohabitation was well known to the Testator's Wife, while she lived; the Testator being very desirous of having Children of his own, to whom he might leave his Property; and not expecting any from his Wife: that during such Cohabitation the Testator had Three Children by her, now living: namely, *Mary Ann Wilkinson*, born the 27th of July,

1802,

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1802, at the Testator's Dwelling-house at *Bradley*: *Jonina Wilkinson*, born on the 6th of *August*, 1805, at the Testator's same Dwelling-house; and *John Wilkinson*, born the 8th of *October*, 1806, at the same House; admitting, that she never was married to him; that he always acknowledged them as his Children by her; and usually called them by his Surname; by which they went; and they were looked upon by all Persons, acquainted with them, as the Testator's Children by her; that they were brought to and placed at his Table; and were always maintained and educated at his Expence, as being his Children. The Answer submitted, that the said Three Children, born before the Date of the Will, had, when his Will and Codicils were made, acquired Names of Reputation, and also the Reputation of being the Children of the said Testator by *Ann Lewis*: that, having acquired such Names and Reputation, and being also sufficiently designated in his Will and Codicils, they fell within the Description in his Will; or were to be considered as the Persons thereby intended; and that they were entitled to all his real and personal Estates, except what he specifically disposed of.

Another Manuscript Book was found among the Testator's Papers; which was represented as a Duplicate of that, from which the Passages, admitted to be proved as Part of the Will, were taken: but during the Argument it was said, that there was considerable Variance between them; and that the Probate had been taken, not from the Original, but from that which was supposed to be the Duplicate.

After the Argument the *Lord Chancellor* suggested, whether the Question, what Papers constituted the Will as to the real Estate, must not go to a Jury; or be stated as a Case for the Opinion of a Court of Law; his Lordship declaring, that he had no Doubt, these Books could

not

not be so considered. After some Consideration it was agreed, as the most convenient and expeditious Course, that the Case should be re-argued before the *Lord Chancellor*, assisted by some of the Judges. Upon the second Argument the Plaintiff's Counsel confined his Claim to the real Estate.

Sir Samuel Romilly, Mr. Hart, Mr. Bell, Mr. Wingfield, and Mr. D. F. Jones, for the Plaintiff.

The Plaintiff claims these Estates under the Will of his Uncle for Default of those Persons, to whom they are devised in Preference to him. These Defendants, whatever might have been the Testator's Intention in their Favor, are as much out of the Case, as if they were naturally dead, or had never existed. They are not to be considered as the Testator's Children. Their Title will be set up, first, upon the Will itself, and the Codicils, attested by Three Witnesses: Secondly, by an Attempt to connect with the Will Papers, relating only to the personal Estate; so as to give them Effect as to the real Estate. It is laid down certainly, that there is no Distinction between "*procreatis*" and "*procreandis*" (a); upon technical Reasoning, that the Limitation might have no Effect, if it would not include a Child already born: but the plain Construction of this Will is, that Children to be born at a future Time were intended; and there is no Devise to Children already born: but if such Children can be considered the Objects, yet, being illegitimate, there is no Description sufficient in Law to enable them to take. The Expression of the Will throughout points to future Children; and he might have looked to legitimate Children by *Ann Lewis*; who after the Death of

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(a) See *Doe on the De-* *Maule and Selwyn's Rep.*
mise of James v. Hallett, 1 124.

his

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his Wife was to be placed in his Mansion-house; and seems to have been regarded by him as a second Wife: a Circumstance, that strongly fortifies the Construction, that he had future Children only in his Contemplation; if the Words were not so free from Ambiguity, so clearly referring to future Children, that it is unnecessary to have Recourse to the probable Intention: “the Children which “I may have by the aforesaid *Ann Lewis*, and living at “my Decease,” &c. the latter Part of the Description being restrained by the preceding Words; with which also the subsequent Expression “Children born to me,” of ambiguous Import, capable of either Sense, is connected by the relative Term “such.” The single Instance of Words, applicable to Children then born, is in the Direction for Maintenance, “in case I leave any Child or “Children by the said *Ann Lewis*;” which cannot have the Effect of extending by Inference the former Description, so plainly expressed.

If after-born Children were intended, they cannot possibly take. The Case of *Metham v. The Duke of Devonshire* (*a*) only confirmed what was the Law before; that illegitimate Children can take only by a Name of Reputation; which must be acquired after their Birth. If the Intention was to give to the Children he already had, those Children cannot take. A Testator cannot give either to his own illegitimate Children, or to those of another Man, otherwise than by Description; either by a Name acquired, or by some remarkable Quality or Defect; by which the Person may be distinguished; and the Rule of Law does not admit Evidence, that the Person so described is the Child of any one, if not legitimate. The Rule is laid down by *Lord Coke* (*b*), according to *Blodwell v. Edwards* (*c*), the

(*a*) 1 P. Will 529.

430. 2 Rol. Abr. 43: Nov,

(*b*) Co. Lit. 3, b.

35,

(*c*) Cro. Eliz. 509, Moor.

most

most accurate Report of which is in *Croke*, that a Bastard, having gotten a Name by Reputation, may purchase by his reputed or known Name to him and his Heirs; although he can have no Heir but of his Body. Then he gives an Instance, that a Bastard shall not take a Remainder under the Description of Issue; because in Law he is not Issue; for “*Qui ex damnatio Coitu nescantur inter Liberos non computentur;* and, as *Littleton* saith, a “Bastard is *Quasi nullius Filius*; and can have no Name “of Reputation, as soon as he is born. So if it is a Man “make a Lease for Life to *B.*, the Remainder to the “eldest Issue Male of *B.* to be begotten of the Body of “*Jane S.*, whether the same Issue be legitimate or illegitimate, and *B.* hath Issue a Bastard on the Body of *Jane S.*, this Son or Issue shall not take the Remainder; for “by the Name of Issue, if there had been no other Words, “he could not take; and a Bastard cannot take but after he “hath gained a Name by Reputation, that he is the Son of “*B.*, &c.; and therefore he can take no Remainder, limited “before he be born: but after he be born, and that he “hath gained by Time a Reputation to be known by the “Name of a Son, then a Remainder, limited to him by the “Name of Son of his reputed Father, is good: but if he “cannot take the Remainder by the Name of Issue at the “Time, when he is born, he shall never take it.”

There are some Terms ambiguous here, as to taking as a Son, after he has acquired a Name by Reputation: but it is settled, that there must be something more than a mere Acknowledgment of him as the Child of that Person, to enable a Bastard to take. This Subject received much Consideration in the Case of *Godfrey v. Davis* (a): a Decision by Lord *Alvanley* much against his Inclination, convinced of the clear Intention in favor of the illegitimate Children, proved by the strongest Evidence of the Testator's

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(a) 6 Ves. 43.

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tator's great Intimacy with *Harwood* and his Family, and Knowledge, that he had no legitimate Children, and that those were treated by him as his Children. *Cartwright v. Vawdry* (*a*) is a Case of as great Hardship, and as clear Intention for the illegitimate Child, and the strongest Evidence, that she was always considered by the Father as one of his Children. In *Harris v. Stewart*, another Case before Lord *Loughborough*, in which your Lordship was Counsel, immediately after the Birth of an illegitimate Child the Parents married; and had several other Children: the eldest, though illegitimate, was brought up with the rest without Distinction; and was proved to have been a Favorite with the Uncle; who by his Will gave all his Property to his Sister, the Mother, for Life, and after her Decease to be equally divided among all the Children; intending certainly to include the eldest; who had no other Provision; Lord *Loughborough*, regretting, that the Person, who drew the Will, had not the Caution to name the Children, was under the Necessity of deciding with great Reluctance, that the eldest took nothing. These Cases have gone a great Way towards ascertaining the Sense of what is stated in Text Writers as to a Bastard acquiring a Name by Reputation; which must be understood as giving a Capacity to take by that Name, merely as a Description; not as a Child, by a Claim of Kindred. In a late Case, *Earle v. Wilson* (*b*), the *Master of the Rolls* upon these Authorities, laying down the Principle and Doctrine in the same Way, would not hold a natural Child entitled under the Description "such Child or Children" "as *A.* may happen to be ensient of by me."

If this Testator had lived long enough to marry *Ann Lewis*, and had legitimate Children by her, which was the Case of *Cartwright v. Vawdry* and *Kenebel v. Scrafton* (*c*),

(*a*) 5 *Ves.* 530.(*c*) 2 *East.* 530.(*b*) 17 *Ves.* 528.

could

could the illegitimate Children possibly have taken with the legitimate; and is the Construction to depend upon the Event? He seems to have contemplated that Event; to have considered her very much as his Wife; substituting her after his Wife's Death in the Possession of his Mansion-house, with the Household Furniture, &c. and imposing upon her the Condition not to marry. The Intention is clear, at least, that after-born Children also should take; and it would be extremely difficult upon the Words to hold the Devise good as to those already born, and not as to those afterwards born. The enormous Inconvenience and Danger of admitting Evidence to determine, who is the Father, demonstrate the Wisdom of the Rule of Law. In an Inquiry as to the Child of a married Man the Fact admits no Doubt: in the other Case it depends upon the Caprice of the Woman; producing all that Uncertainty in Property, to prevent which these Rules were established.

The second Question is, whether in construing this Will the Court can take into Consideration these Papers, which have been treated as Codicils: this Book, which is represented as Part of the Will, upon the Reference after the Nomination of Executors to some Book, which he will leave. It is now clearly settled, that real Estate cannot be disposed of by a Will with three Witnesses, referring to some future Instrument, not executed with the Forms and Solemnities, required by the Statute (*a*). The Law on that Subject is clearly recognised and confirmed in *Habergham v. Vincent* (*b*). The Reference in this Will to a written Book is confined to one Subject, the better Improvement of his Estate and carrying on the different Works and other Matters to be attended to in the Execution of the Trusts; which must be restrained to other Matters

(*a*) Stat. 29 Ch. 2, c. 3. (*b*) 2 Ves. jun. 204.

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of the same Kind with those before specified: a mere Direction to the Trustees as to the Management of the Estate: but, if reciting, that there was some Ambiguity in his Will, he had expressly referred to some Book or Paper, to be written and executed not according to the Statute of Frauds, explaining, who were his Devisees, that could not be taken into Consideration: his Intention could not be so explained. This Book however contains nothing supplemental to the Devise, to remove the Doubts, occasioned by the imperfect Expression of his Will as to his Devisees. It is a Book, in which Memorandums and Observations were made from Time to Time, and all those Parts were written after the Date of the Will. This is not therefore a Paper then existing; which might perhaps be made Part of the Will; if so clearly referred to, described and identified, by the Will as to amount to Incorporation, according to Mr. Justice Wilson's Opinion (*a*) in *Haberg-ham v. Vincent*, and your Lordship's in *Smart v. Prujeau* (*b*): but if by this Sort of Reference a future testimentary Paper, which he is to leave, can have Effect, though written afterwards, or by some subsequent Act made Part of his Will, all the Security, required by the Legislature, not only as to the Form of the Will, but also as to the Sanity of the Testator at the Time, would be entirely lost. From both those Cases it is clear, that a farther Charge upon real Estate without Re-execution according to the Statute can be valid only in the Shape of Debts and Legacies. How could the Ecclesiastical Court exercise a Discretion by selecting Parts of this Book; granting Probate of some Parts; omitting others, to which the Will more particularly refers: in what Manner, and for what Purpose, these abstract Passages were selected, not appearing?

Thirdly, as to the supposed Re-publication: there is none having any Reference to this Book or any of these Cod-

(*a*) 2 Ves. jun. 228.

(*b*) 6 Ves. 560.

cils:

cils: the Re-publication is only of the Will, itself, as a Devise of real Estate merely; and after the Decisions, that have taken place, it cannot be maintained, that any of these Codicils are by the Effect of Re-publication made Part of this Will. The Judges of late have cautiously avoided farther breaking in upon the Statute of Frauds; as appears in the Cases, referred to in *Pigott v. Waller* (a).

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Mr Richards, Mr. Hollist, Mr. Leach, Mr. Benyon, and Mr. Preston, for the infant Children, Defendants.

The Proposition, denying the Title of these Children to the real Estate, which upon the clear Intention in their Favor is admitted as to the Copyhold and personal Estates, appears singular out of a Court of Justice. The Court, deciding against them, must be satisfied, that they decide against the real Intention, and the clear Evidence, that they were acknowledged as the Testator's Children by *Ann Lewis*. Being a married Man at the Date of the Will, though not at the Re-publication, he must, when making the Will, have intended natural Children; and the Court is as much bound by the Intention in Favor of illegitimate Children as legitimate, when it can be ascertained. The Question is only, whether this Will does not clearly and decisively shew, that the Testator had no other Object than his natural Children. That Object is expressed in the Will by the plainest Terms, the Children he may have by *Ann Lewis*; not having in contemplation Marriage with her; and therefore meaning the Children he then had, and probably those he might have, by her in a single State. It seems to be admitted, that if he had used the Description "natural Children by her," it would have been sufficient; and the Terms he has used are under the Circumstances equivalent. The Word "Children," which certainly,

(a) 7 Ves. 98.

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taken simply without Qualification, must be interpreted law-  
 ful Children, is in this Will by necessary Construction to be  
 understood the natural Children, which he has or may have  
 by *Ann Lewis*. The Policy of the Law does not permit  
 a Devise to the natural Children a Person may have in  
 future; not acknowledging such a Relation, before it actu-  
 ally exists: but there is no Rule, preventing an illegitimate  
 Child from taking, who by coming into Existence has  
 acquired a Capacity to take. The Decision in *Earle v. Wilson* against an illegitimate Child *in Ventre* does not  
 apply to these, who were in Existence. That he meant  
 to substitute *Ann Lewis* for his Wife is an impossible  
 Construction, not only from the Presumption of a Devi-  
 sor, that the Devisee will survive him, but by the express  
 Condition, upon which she is to succeed, that she shall  
 remain unmarried. The Word "may" does not necessa-  
 rily import Futurity; as, "the Possessions, that I may  
 "have I will give," or "In case I shall leave any Chi-  
 "dren," though apparently future, would include Posse-  
 sions, or Children, he had at that Time; but, admitting that  
 to be an equivocal Expression, its Sense is determined by  
 the whole Context with the additional Words, "and living  
 "at my Decease." Considered upon the Principle of  
 construing a Will, with reference to the Intention, there is  
 no Doubt, that this includes all the Children by *Ann Lewis*,  
 born or to be born, if living at his Decease: "and" being  
 a mere unnecessary expletive; who must necessarily be  
 natural Children; and are designated as particularly as if  
 named; which is not necessary: the Mode of pointing  
 them out being indifferent. This Intention is plain from  
 other Parts of the Will: the Clause, giving Maintenance;  
 and the anxious Provision against her Marriage; which  
 would have withdrawn her Attention from these Children.  
 The Name by Reputation, required by the old Authorities,  
 does not necessarily mean a Name by Baptism.

Secondly;

Secondly: upon the Evidence, if it can be admitted, there is no Doubt. Upon the Question, how far a Paper unexecuted can be considered as inserted in a Will duly executed, it is not contended as to Papers to be afterwards written; as if he had mentioned a Paper, in which he should afterwards name the Devisees: but this Book is sufficiently identified to enable the Court to consider as incorporated those Parts, that were written at the Date of the Will; though the whole cannot be read. Thus the Entry as to these Children in the Book, which is proved to have been there, when the Will was made, being incorporated, those Children must be considered as if they were named in the Will. It is asserted, that the Introduction of this Book is making a Will by parol Evidence. Whatever may be the Nature of the Reference in the Will to another Instrument, it must be introduced by parol Evidence: but your Lordship has suggested a Difficulty in another Form; whether there is upon the Face of the Will a Description of this Book sufficient to satisfy the Court, that the Book produced is the Book referred to. The only two Authorities upon the Objection, so put, afford no Principle applicable to this Case: *Smart v. Prujean* (*a*) and *Doe on the Demise of Sibthorpe v. Taylor*; cited (*b*) by *Buller*, Justice, in *Habergham v. Vincent*; proceeding on the Ground, that it was a subsequent Codicil. The Effect of all this Evidence is, that this Book answers the Description in the Will, "Observations and Directions for the better Improvement of my Estates, and carrying on the different Works as well as other Matters;" satisfying the Rule, upon which the Paper was rejected in *Smart v. Prujean*, that the Reference must be to a Paper, which on Proof of its Existence will be identified by its Contents. The Ecclesiastical Court, granting Probate of this Instrument, have decided, that it is Part of the Will; which can only be by

(*a*) 6 *Ves.* 560.

(*b*) 2 *Ves. jun.* 232.

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this Reference: the Registers of the Children's Births not being in their Nature testamentary. The Evidence as to this Book proves, that it was always kept with the Will; and a Duplicate of it was also kept. There is therefore no Doubt of the Identity.

The Effect of the Re-publication, which is of every Thing contained in those eight Sheets of Paper, and every Thing referred to, is to bring the Will down to that Date; as after-purchased Lands will pass under a general Devise by the mere Effect of a subsequent Re-publication. This then must be considered as a Will of the 5th of January, 1808, and as speaking of the Book at that Date. The Evidence is, that at each Re-publication the Book was with the Testator, and these Entries were made by him before the Re-publication; that he kept the Original and Duplicate; carrying one with him; and leaving the other at his general Residence; and never did any Act of Re-publication without having the Book with him. This Book is therefore to be considered as incorporated in the Will at the Time of the last Re-publication; and then these Entries are decisive. The Codicil re-publishing gives Effect to the Will and every thing incorporated in it down to the Date of the Re-publication. The Cases upon this Subject were much considered in the two last: *Barnes v. Crowe* (*a*) and *Piggott v. Waller* (*b*); which have settled the Law. The Mode of Expression concerning this Book, "which I shall leave," as a future Act, affords no necessary Conclusion, that the Book was not then in Existence: that particular Expression applying, not to the Creation of the Book, but to the Act of leaving it at his Death.

Sir Arthur Piggott, and Mr. Daniel, for the Co-

(*a*) 4 Bro. C. C. 2. 1 Ves.  
jun. 486. (*b*) 7 Ves. 98.

heiresses

heiresses at Law, contended, that the Devise to the illegitimate Children, if it could not take Effect in their Favor, would prevent any other Person's taking under the Will; so as to let in the Claim of the Heir at Law; and also, that the Difference between the Terms of Thirty-one and Twenty-one Years was an Interest in real Estate undisposed of: but, the *Lord Chancellor* having upon the first Argument expressed his Opinion against these Claims, they were not pressed in the second.

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*Sir Samuel Romilly, in Reply.*

The Rule of Law cannot be disputed; that the Word "Child" in a Will or Grant must be understood a legitimate Child; unless some additional Description proves, that an illegitimate Child was intended; which must be a necessary Conclusion certainly. The Question in these Cases is, how it is possible for an illegitimate Child to take under the general Description of "Child;" as he certainly may, if pointed out by some peculiar Quality: some personal Defect; as being blind, deaf, or dumb; or by a particular Residence; in all which Cases the Individual is so distinctly marked, that no other Person can be supposed. If Lord Coke meant to assert, that a Grant or Devise might be made to an illegitimate Child by the Description of "Child," which is by no means probable, that has been long over-ruled; particularly in *Godfrey v. Davis* (*a*); where Lord *Alvanley* with great Clearness, but great Reluctance, as against the plain Intention, held that not to be the Meaning of the Passage in the First Institute (*b*); but that some Person must be shewn, who had acquired the Reputation of being the Child of that Father. The Expression "the Children which I may have," which is represented as not importing future Children only, but

(*a*) 6 Ves. 43.

(*b*) Co. Lit. 3, b.

referring

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referring also to those already born, admits either a prospective, or retrospective, Sense, or both; as it is used indefinitely, or with a definite Meaning. A Man speaking of such Estate as he "may purchase," certainly means in future: if of such as he may have purchased at the Time of his Death, he means both past and future: so saying, he will give such Information as he may have To-morrow as future: but it would be inaccurate to say, "sit down; " and I will give you such Information as I may have." The Conclusion is, that this Expression, when used indefinitely, has a future Sense; but is both retrospective and prospective, when it refers to some future, definite, Period. The Difficulty upon the Defendant's Construction from the additional Description "and living at my Decease" removing all Doubt, the Word "and" upon that Construction having no Use, compels them to reject that Word, as a mere expletive: a Measure, to which the Courts never resort, if, the Word being retained, the Sense is perfect; and, being rejected, is perfectly different: still less would they be disposed to adopt that Course for the Purpose of aiding the Claim of illegitimate Children under an ambiguous Phrase. The Clause, directing Maintenance, in case he shall leave any Child or Children by *Ann Lewis*, taking the whole together, and particularly the Conclusion, in the same Terms as before "such Child or Children, which & "may have," shews, that he looked to future Children.

The Answer to the Objection, from speaking of his Children by another Woman in the same Will, in which he supposes his Wife will survive him, is, that a Testator, making his Will, generally contemplates a Variety of Events. If beyond the Devise to these Children he had made no ulterior Disposition, that Argument, though not conclusive, would have more Force: but, taking into View the Probability, that he might have no Children, such as are described, and under that Impression devising over

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to a Person, nearly connected with him in Blood, who lived with him under the Expectation, resulting from that natural Connection, can it be maintained, that he must have had in Contemplation, that all these Events would happen; and that he could not intend a conditional Devise to his Wife, if she should survive; and, if not, contemplating his Marriage with *Ann Lewis*: and devising to her Children? The Condition, that she shall continue single and unmarried, does not affect this Construction. A Provision for a Widow, while she continues single and unmarried, is not unusual; and is understood not as having never been married, but as continuing in that single State of Widowhood. That Restriction from a subsequent Marriage, so frequently imposed by old Men, with the other Circumstances of the Devise to *Ann Lewis* raise the strongest Inference of an intended Marriage with her; and the Inclination of the Courts is uniform in Favor of Legitimacy; of which *Alsop v. Stacy* (a) is a strong Instance; where upon that Principle, a Child being born Forty Weeks and Ten Days after the Husband's Death the Question was left to the Jury; and the Child was held legitimate.

No Instance has occurred of legitimate and illegitimate Children taking under one Description in a Will; which would overthrow the Rule, and the Principle, upon which these Cases have been decided: the Preference given to legitimate Children: strongly exemplified by supplying the Want of a Surrender of Copyhold, and giving Interest, not expressed, upon a Legacy; refusing it to illegitimate Children; not considering illegitimate Children unfavorably as Individuals; but disavowing the Knowledge of a Violation of the Law, and avoiding the difficult Inquiry upon the Fact of Legitimacy. If it is to depend upon Repu-

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(a) *Palmer*. 9.  
tation,

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tation, what can be more vague, more productive of Difficulty and Uncertainty? Reputed: by whom? By the World? One of these Children was but Six Weeks old, when the Will was made; incapable therefore of having gained a Reputation. There are many Instances of Children the reputed Children of more Fathers than one. In the Case of the *Berkeley Peerage* if Lord Berkeley had made a general Bequest to all his "illegitimate Children", those, who by the Decision of the *House of Lords* were illegitimate, could not have taken; not being so reputed; but being acknowledged as legitimate by him. *Metham v. The Duke of Devonshire*, it is true, is against this Argument: but the Point does not appear to have been considered: nor the Consequences, to which the Rule, as there laid down, establishing a Bequest to all "the natural Children" would reach.

Some important Observations arise upon the Facts, now disclosed. It has not been sworn either here or in the Spiritual Court, that there is no other Book, that can answer the Description in the Will, except that, which has been proved; which is the Duplicate. Adam swears, he found this Book with the Will; but does not say, he found no other. Probate has been granted only of those Parts of the Book, relating to the Children, not of those, relating to the Iron Works. Upon this very vague Description it is material to ascertain, that there is no other Book or Paper. A Book, that he shall leave, does not necessarily refer to a Book, already written: but it does necessarily refer to a future Act. In *Smart v. Prujeau* the Person, with whom the Paper was left, was defined: but these Directions may be in his Account Books, in his Chest of Drawers, any where. Nothing can be more vague and indefinite: supposing these Books to be the same: though they vary in many Respects. A Passage in the Will directs his Burial to take place "in such  
"Manner

" Manner as is directed in the Book hereinafter referred to :" but the Book produced contains no such Direction. The Specimen of an Epitaph cannot be the Direction as to his Funeral alluded to. This is decisive Evidence, that the Court has not before it *the* Book ; that the Book referred to is some other Book ; which cannot now be produced ; and this shews the Danger and Uncertainty of proceeding on such Evidence : the Book produced in no Way answering the Description. What Parts of this Book he intended to be Part of his Will should be shewn clearly. It is said, the Re-publication and the Codicils make the Book Part of the Will : but the utmost Effect of the Re-publication is to make the Will speak at that Date. If therefore the Book had been more particularly described, by the binding, the Place, where it would be found, &c. and he had destroyed that Book, and placed another, answering the Description, in the same Place, that would not by the Effect of the Re-publication be Part of his Will. This Book therefore cannot have Effect as a Codicil. The particular Terms of the Re-publication, expressing Eight Sheets of Paper, exclude any Idea of a Re-publication of Codicils, generally. The Mischief with reference to the Statute of Frauds is, that there is no Security for the Sanity of the Testator at the future Time.

The Lord Chancellor during the Argument, and at its Close, made the following Observations.

The Cases, as far as they have gone, have raised Doubts, even as to a Paper, antecedently existing, but clearly and undeniably referred to in a Will : but I take it to be decided, and there is no Doubt, that a Paper, made afterwards, could never be Part of the Will ; for the Unattested Paper, clearly referred to in a Devise of real Estate, con-

sidered Part of the Will, if made previously : not if subsequent.

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Legacies by an unattested Paper included under a Charge of Legacies on a real Estate by a Will duly attested: but the Produce of the Sale of a real Estate cannot be directly disposed of by an unattested Paper.

Three Witnesses, required by the Statute, are Witnesses to the Sanity of the Testator, and to all, that is necessary to constitute a good Will. The Consequence is, that the subsequent Paper has not the Ceremonies, necessary to constitute a Devise of Land. The Cases upon a Charge of Legacies by a Will with Three Witnesses apply to this; and though it is settled, that Legacies, given by an unattested Paper, will be included in that Charge, that has been met at least with this Symptom of Disapprobation, that it is remarked as a solitary Case; and if by a Will duly attested the Devisor directs an Estate to be sold, though he could have exhausted that Fund by Legacies, he could not by a Will unattested give away any Part of it.

I know no Law against devising to the Children of a Woman, whether natural, or not; as that creates no Uncertainty. The Difficulty arises upon a Devise to the Children of a particular Man by a Woman, to whom he is not married. This Testator upon the same 26th of March, 1807, on which he re-published the Will, makes one of these Entries in the Book; and clearly after the Re-publication; which is expressly recited; and he proceeds by this Paper to say, that Children, though not born within Six Months after his Death, shall take, if born within the longest Period allowed for Gestation; and that is explained in such a Way, that the Devisees would take, whether his natural Children, or not; as he there describes them only as her Children: Is it possible then by an unattested Paper, made on the same Day, but after a Re-publication of his Will duly attested, to vary in Two Respects so material the Description of his Devisees; introducing as Devisees of real Estate Children, born more than Six Months after his Decease; and, though by the Will it was necessary to shew, that they were his reputed natural Children, this Codicil making it necessary only to shew, that they were her's?

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I do not see, how I can take one Part of this Book as forming his Will less than another ; unless the Manner of the Description necessarily leads me to select some Parts, and reject others ; and then what am I to select, and what reject ? The Spiritual Court must either take the Whole, or select those Parts, which fall under the true Meaning of the Description in the Will “ Directions and Observations for the better Improvement of my Estates and carrying on the different Works as well as other Matters ; ” and, if the Whole is taken, how is it possible to execute such a Will ? Many of these Directions are dated before the Will ; many with only one Witness : several are left standing without Remark : others crossed out ; and the Reason stated, that he had made a Will of the Date 1806. How is it possible to say, that what is not crossed out is not a Part of the Will ? If I am to take this Book as a Will, disposing of real Estate, I must be informed, what Parts of it form the Will, of which I am to declare the Trusts.

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Some Points of this Case admit no Doubt. It is impossible to make out the Two Points, contended for the Heir : first, that the Will means illegitimate Children ; who, though incapable themselves of taking, would prevent the Plaintiff from taking ; and so give Title to the Heir. That cannot be maintained ; as, if illegitimate Children are meant, there is no Rule of Policy, which prevents the Court from saying, that they are intended : in other Words, if they are sufficiently described, there is no Rule, that prevents their taking : but, if they are not sufficiently described, but legitimate Children are the Persons to take, then, as there are no legitimate Children, there is no prior Taker described before the Plaintiff. There is no Doubt therefore, that the Existence of those Children, if they cannot take, does not form a Bar to the Plaintiff's taking.

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The next Point, contended for the Heir, arises upon the Codicil, reducing the Term of Thirty-one Years, created by the Will, to Twenty-one Years; that the Difference is an Interest in real Estate undisposed of: but this is merely a Substitution of one Term for the other; the Effect is precisely the same as if a Term of Twenty-one Years had been originally created; and there is no Interest undisposed of.

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The following written Opinion was sent by Baron Thompson and the Justices Le Blanc and Gibbs to the Lord Chancellor.

The Question, to which our present Opinion will be confined, is, whether the Three natural Children of John Wilkinson by *Ann Lewis*, born before the making of his Will of November, 29th, 1806, are entitled to take his real Estate by force of that Will alone.

The Facts, out of which this Question arises, are these. Mr. Wilkinson, being seized of a very considerable real Estate, and possessed of personal Property to a very large Amount, on the 29th November, 1806, made his Will, duly executed and attested for passing real Estates. At this Time he had a Wife *Mary Wilkinson* still living, but no Children by her. A Woman of the Name of *Ann Lewis* was living with him; by whom he had Three natural Children: *Mary Ann*, born July 7th, 1802; *Jonina*, born August 6th, 1805; and *John*, born October 8th, 1806. All these Children at the Time, when the Testator made his Will, had acquired the Character and Reputation of being his natural Children by *Ann Lewis*. The Testator's Wife *Mary Wilkinson* died in December, 1806. Subsequent to her Death the Testator re-published his Will in the Presence of Three Witnesses. On the 14th of July, 1808,

1808, the Testator died; leaving the said *Ann Lewis* and his said Three natural Children by her surviving him.

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From the material Parts of this Will; as they bear upon the present Question, we think, it most certainly appears, that the Testator meant the above-mentioned Devise to operate in favor of his illegitimate Children, born and to be born, by *Ann Lewis*; and that he had illegitimate Children only in his Contemplation.

The Manner, in which he describes the Children themselves, and *Ann Lewis*, their Mother, as living with him, whilst his Wife was then alive, the Mode, in which he appoints her Guardian of such Children, the limiting her Annuity and her Compensation for the Guardianship to the Time of her continuing single and unmarried, together with many other Passages in the Will, appear to us to place this Intention beyond all possible Doubt.

It has been said, that the Testator might, when he made his Will, have looked to the Possibility of his Wife's dying before him, of his marrying *Ann Lewis*, and of his having Children by her; and that such Children may have been the Objects of his intended Bounty under the above Bequest: but it is impossible for any Man, looking through the whole of this Will, to suppose, that he entertained any such Intention; or that he had any such Objects in view; and it is observable, that he has evidently contemplated a State of Things, in which the Event of his Marriage with *Ann Lewis* would have been impossible; and yet his Children by her are still to take; for he has bequeathed his Mansion House at *Castle Head*, and certain other Parts of his Property, to his Wife for her Life, and after her Decease to *Ann Lewis* for her Life, and after the Decease of both to his Children by *Ann Lewis*. Now, supposing these several Bequests to take place in the Order, in which

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they stand, the Wife of the Testator must have survived him; and his Children by *Ann Lewis* must consequently have been illegitimate. We think therefore, that his illegitimate Children, born and to be born, of *Ann Lewis* were the intended, and probably the sole intended, Objects of his Bounty. We also think, that, if he had any illegitimate Children by her, after his Will was made, such future Children could not have taken for the Reason, which is to be found in all the Authorities upon this Subject; that an illegitimate Child can only take by his reputed Name of Child; and that, until he is born, he cannot acquire that Name by Reputation.

But with respect to the Three Children, who were born before the making of the Will, the Depositions prove most abundantly, that they had then acquired the Reputation of being the Children of the Testator by *Ann Lewis*; and thinking for the Reasons above given, that they were the intended Objects of the Testator's Bounty, we think, that they are intended to take the real Estate under the Will itself without the Aid or Explanation of any other Paper.

It has been argued, though not much pressed, that this Devise applies only to future illegitimate Children; and is therefore void: but, looking to the different Parts of the Will, we think, it clearly appears, (if that were necessary) that the Testator had in his actual Contemplation the illegitimate Children, who were then born, as well as those, whom he might afterwards have by *Ann Lewis*. It was also urged, that, as the Testator re-published his Will after the Death of his Wife, and when the Event of his marrying *Ann Lewis* was thereby brought within his own Power, it is fairly to be presumed, that under the Description of his Children by *Ann Lewis* he meant such Children as he might have by her if he should afterwards marry her: but we think, that in the Construction of this Devise the Intention

Intention of the Testator is to be collected from the State of Things at the Time, when he made his Will, not when he re-published it; and we also think, that, if the Alteration, which took place in the Interval between the making and re-publishing his Will, were taken into the Account, enough would still remain to shew, that his illegitimate Children by *Ann Lewis* were the Objects, whom he had in view.

It was also contended, and this appears to have been the main Stress of the Argument, that, admitting the Intention of the Testator to be clear in favor of his illegitimate Children by *Ann Lewis*, that illegitimate Children, born before the Will, are included, and that the Claimants had acquired the Name and Reputation of being the Children of the Testator by *Ann Lewis*, still by the settled and established Rules of Law they cannot take under the general Description of Children in this Bequest; and a Passage in Coke, Litt. 3.b. was cited, and much commented upon, as supporting this Doctrine. It is there said, that "a Bastard having gotten a Name by Reputation may purchase by his reputed or known Name to him and his Heirs; although he can have no Heir but of his Body. A man makes a Lease to *B.* for Life, Remainder to the eldest Issue Male of *B.* and the Heirs Males of his Body. *B.* hath Issue a Bastard Son. He shall not take the Remainder; because in Law he is not his Issue; for *Qui ex damnato Coitu nascuntur inter Liberos non competitur*; and, as Littleton saith, a Bastard is *quasi nullius Filius*, and can have no Name of Reputation as soon as he is born. So it is, if a Man make a Lease for Life to *B.* the Remainder to the eldest Issue Male of *B.* to be begotten on the Body of *Jane S.* whether the same Issue be legitimate or illegitimate. *B.* hath Issue a Bastard on the Body of *Jane S.* This Son or Issue shall not take the Remainder; for (as it hath been said)

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" by the Name of Issue, if there had been no other Words,
 " he could not take; and (as it hath been also said) a
 " Bastard cannot take but after he hath gained a Name by
 " Reputation, that he is the Son of *B. &c.*; and therefore
 " he can take no Remainder, limited before he be born:
 " but after he be born, and that he hath gained by Time a
 " Reputation to be known by the Name of a Son, then a
 " Remainder, limited to him by the Name of the Son of
 " his reputed Father, is good. But, if he cannot take the
 " Remainder by the Name of Issue at the Time, when he
 " is born, he shall never take it."

Illegitimate Child cannot take by the Description of Child of his reputed Father, until he has acquired the Reputation of being such Child.

We collect from this Passage, that an illegitimate Child cannot take by the Description of Child of his reputed Father, until he has acquired the Reputation of being such Child: but that after he has acquired the Reputation of being such Child he may take by that Description. So Lord Macclesfield appears to have understood it in the Case of *Metham v. The Duke of Devon* (*a*), hereafter referred to; and the *Master of the Rolls* in the Case of *Earle v. Wilson* (*b*) recognizes this as the Doctrine adopted and acted upon by Lord Macclesfield in the above mentioned Case of *Metham v. The Duke of Devon*.

It was admitted in Argument by one of the Counsel, who opposed the Claim of the Children, that, taking the Intention to be clear in favor of illegitimate Children, if the Devise had been to the Testator's Three Children by *Ann Lewis*, it would have been a sufficient Designation of them: but he insisted, that illegitimate Children could never take under the general Description of Children, as a Class; and he pointed out several Inconveniences, which he supposed would arise out of an Enquiry into the Fact, whether the several Claimants were or were not the Children of the Testator.

(a) 1 P. Will. 529.

(b) 17 Ves. 528.

But

But it appears to us, that the Enquiry must be the same in Substance, whether the Bequest were to the Testator's Three illegitimate Children by *Ann Lewis*, or to his illegitimate Children, generally, by her; that in the latter, as well as the former, Case the Enquiry would not be into the Fact, but into the Reputation of their being such; and that the Inconveniences pointed out could never arise; because it is not the Fact of the Relationship, but the Reputation of it, which is to be enquired into in both Cases.

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In the former Case we should have to enquire, whether each of the Persons, who presented himself as one of the Three Children, designated by the Will, had, or had not, at the Time of the Will acquired the Reputation of being such Child: in the latter the Nature of the Enquiry would be precisely the same; though it might be directed to a different Number of Objects.

The Case of *Godfrey v. Davis* (a) was cited as an Authority against the Claim of the illegitimate Children in the present Case. That was a Bequest in Remainder to the eldest Child Male or Female of *William Harwood*; and the *Master of the Rolls* held, that an illegitimate Child of *William Harwood* could not take; although it was known to the Testator at the Time of making his Will, that *William Harwood* had only illegitimate Children: but there *William Harwood* was a single Man: the Event of his marrying and having legitimate Children might fairly be looked to; and there was nothing apparent upon the Face of the Will, or to be collected from the State of *William Harwood's* Family, which shewed, that the Testator meant by the Word "Child" to describe an illegitimate Child. In the present Case, we think, the

(a) 6 Vcs. 43.

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Will itself points clearly and manifestly at illegitimate Children.

It has also been urged against this Construction of the Devise in favour of the illegitimate Children, that, whatever the Intention of the Testator might be, it was at least a possible Event, that the Testator might survive his Wife, and marry *Ann Lewis*, and have Children by her; in which Event those legitimate Children would answer the Description of the Testator's Children by *Ann Lewis*; and must necessarily take under the Will; and that it is an established and inflexible Rule of Law, that legitimate and illegitimate Children cannot take together under the general Description of Children. We will take the former Part of this Proposition to be true; and we think, it is so. It was possible, that the Testator might outlive his Wife, and marry *Ann Lewis*, and have legitimate Children by her: the Words of the Devise are large enough to include such Children; and there appears no express Intention to exclude them; though probably the Testator had them not in Contemplation. We incline to think, therefore, that such Children would take under the Devise: but the Conclusion, drawn from thence, that under the Circumstances of this Case the illegitimate Children cannot take with them, is not, as we think, well founded. We think, that the illegitimate Children take, because they were clearly meant; and that if legitimate Children of the Description above mentioned would also take, it is because the Words are large enough to reach them; and the Testator expressed no Intention to exclude them; though he did not contemplate their Existence. When born they would answer the Description of his Children by *Ann Lewis*; and being born in Marriage, though after the Will, the Devise would as to them be free from all legal Objection.

It

It is said, that this Doctrine is opposed by the Authority of several Decisions; and the Cases of *Cartwright v. Vawdry* (*a*), and *Kenebel v. Scrafton* (*b*), are cited, and relied on, for this Purpose. In the Case of *Cartwright v. Vawdry* the Testator gives his real and personal Estates to his Executors, in Trust to apply a reasonable Part of the Produce in the Maintenance, &c. of all and every such Child or Children as he might happen to have at his Death, equally Share and Share alike, until such (*c*) of them should attain Twenty-one or Marriage; then to pay such of them as became of Age or married One-fourth of the whole Income. The Testator had one Daughter, *Mary*, who was always treated as, and supposed to be, legitimate; but was actually born before Marriage, and Three younger legitimate Daughters. *Mary* filed a Bill for her Share as a Child. The others were desirous, that she should share: but Two were under Age. It was contended, that the Division into Fourths by the Testator shewed clearly, that he meant to include *Mary*, as a Child: but the Chancellor (Lord *Loughborough*) says, “ It is impossible in a Court of Justice to hold, that an illegitimate Child can take equally with lawful Children upon a Devise to Children;” and he proposes, that, as all were desirous of giving *Mary* her Share, the Cause should stand over, until the youngest Daughter should attain Twenty-one; which was ordered accordingly; and the Case does not appear to have been again heard of in Court. It cannot therefore be considered as a Decision. Lord *Loughborough* may have thought, that the Intent of the Testator to include his illegitimate Daughter was not sufficiently manifest; and the Doctrine, laid down by him, may be considered as applicable to those Cases only, in which the Word “ Children” is used generally, without a clear Intent; as we

(*a*) 5 *Ves.* 530.

(*b*) 2 *East.* 530.

(*c*) This is probably a Misprint for “ each.”

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think, there appears here on the Part of the Testator to include illegitimate Children. We do not therefore think, that it bears with any Weight upon the present Case.

In regard to *Kenebel v. Scrafton* the Testator *James Bradshaw*, having devised all his real and personal Estate to a Trustee, declared the Uses thereof in the following Words: " I give all my personal Estate whatsoever and wheresoever, " &c. to my dearly beloved *Mary Ann Simpson* one of the " Daughters of *J. Simpson*, &c. for her sole Use and Benefit " for ever; and I will that out of the Reuts, &c. of my said " Estates my said Trustee shall pay unto the said *M. A. Simpson* an Annuity of £150 for her Life; and in " case I shall have any Child or Children by her who shall " be living at my Decease then I order," &c.; and he proceeds to make a Provision for such Children. The Will bore Date the 28th of January, 1795; and the Testator had one Male Child by *Mary Ann Simpson* then living. This Child died on the 9th of June, 1795; and on the 29th of August in the same Year the Testator intermarried with the said *Mary Ann Simpson*; and had Three Children by her; Two of whom were the Defendants in the Cause; the other having died. The Question was, whether the Marriage of the Testator and the Birth of these Children after the Date of the Will operated as an implied Revocation of it; and the Court of King's Bench were of the Opinion, that they did not so operate; holding, that those Children might take under the Will.

Perhaps it might have been well decided upon the Facts of that Case, that it did not sufficiently appear, that the Testator intended to include illegitimate Children in the Devise; inasmuch as both he and *Mary Ann Simpson* were single at the Time, when he made his Will; and there was no Impediment to their marrying, and having legitimate Children; who might be the intended Objects of his Bounty,

Bounty. From the Language of the Judgment however it certainly seems, that the Court thought, that the Testator meant to provide for Children of a different Character and Denomination from legitimate; and yet they determine, that legitimate Children may take under the Bequest. In every View of the Case we think that they might; because the Terms of the Devise were large enough to comprehend them: but nothing is said in that Judgment, from which we can collect, that where a Devise evidently points at illegitimate Children, and where legitimate Children are admitted under it, because the Words are large enough to reach them, the illegitimate Children cannot take together with the legitimate: nor that even in the Case then before the Court, if the illegitimate Child had been living, he would not have been permitted to take with the legitimate Children.

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But if it is an established and inflexible Rule, that legitimate and illegitimate Children can in no Case take together under the Description of Children, we should rather be disposed to say in the present Case, that legitimate Children could not take, notwithstanding the generality of the Words, than that illegitimate Children should be excluded to the Disappointment of the clear and manifest Intention of the Testator. It is observable, that in the present Case there are no legitimate Children to contend with the illegitimate: but we have reasoned it on the Supposition, that there were both; as much of the Argument was founded on the Possibility of that Event,

We have stated the Grounds, upon which independent of any Authority to the direct Point our Opinion in Favor of the Children is founded; and the Manner, in which it appears to us, that the Arguments and Authorities, urged against the Claim of these Children, may be answered: but there is one Authority directly to the Point, that illegitimate

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gitimate Children, born, and reputed as such, before the Will, may take as a Class under the general Description of Children. We allude to the Case of *Metham* against the Duke of *Devon* (*a*).

That Case arose upon a Devise of £3000 by the late Earl of *Devon* to all the natural Children of his Son the late Duke of *Devon* by Mrs. *Heneage*; and the Question was, whether the natural Children of Mrs. *Heneage*, born after the Will, should take a Share of the £3000. No Question was made but that the Children, born before the Will, might legally take; and the Chancellor (Lord *Macclesfield*) in stating the Objection to the Claim of Children, born after the Will, clearly explains the Ground, upon which he thought the Children, born before the Will, might take under that Bequest.

He says, that Bastards cannot take, until they have gained a Name by Reputation; and again afterwards, that a Bastard could not take, until he had a Reputation of being such a one's Child; and that Reputation could not be gained, before the Child was born. It is evident therefore, that under the Description of all the natural Children of his Son by Mrs. *Heneage*, the Lord Chancellor thought, that all, who had acquired the Reputation of being such Children, before the Will was made, might legally take; and consequently that the Enquiry must be, not who were in point of Fact such Children, but who had acquired the Reputation of being so.

For these Reasons we think, that the Three Children of the Testator *John Wilkinson* by *Ann Lewis*, who had acquired the Reputation of being such Children before the

(a) 1 P. Will. 529.

Date

Date of his Will, are entitled to his real Estates under the Will alone, without the Aid of any other Papers.

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A. THOMPSON,

S. LE BLANC,

V. GIBBS.

The Lord CHANCELLOR.

I have been favoured with the Opinion of the Three Judges on the second Point; how far this Book is to be considered as describing the Individuals, who are to take under the Will. The Judges state their Opinion in the following Terms:

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" Upon this Point, as it regards the real Estate, we agree in thinking, the Testator does not refer to the Book, as containing the Description of the Persons to take under the Will ; and it cannot be resorted to as Part of his Will for the Purpose of ascertaining them."

This is expressed in very cautious and particular Terms; from which I understand, they do not go the Length of saying, that no Part of the Book can be considered as Part of the Will. I believe, they intended that: but it may mean, that, attending to the particular Manner, in which the Testator in that Book refers to Subjects, as to which he gives Directions, the Reference is not to that Part of the Book; or that it does not make it Part of the Will. I collect however their Opinion, that it must be by Force of the Will itself, that these natural Children are to take; and that they cannot have the Benefit of the Contents of this Book as a Description of them.

As this is a Case, furnishing Questions, not only of considerable

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siderable Importance, but of Difficulty, and which probably may go to the *House of Lords*, I should not think it right to state merely my Opinion upon the Two Points without the Reasons; and before the Conclusion of the Cause I shall have an Opportunity of conversing with the Judges, and understanding precisely the Grounds, on which they proceeded.

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### *The Lord CHANCELLOR.*

This is a Case, in which, the Testator being a married Man at the Date of his Will, his Wife then living, and having no legitimate Children, it is proved as a Fact, that he had Three infant Children, born of a Woman, named *Ann Lewis*; which Three Children, it appears proved, had gained the Reputation of being his natural Children. After the Execution of his Will he appears to have frequently re-published it: but it is only material to notice, that he did re-publish it, after he had in a Book expressly stated by a Paper, not attested by Three Witnesses, who were the Individuals he meant by the Description of certain Devisees in his Will. He re-published the Will by a Codicil, duly attested, of a Date subsequent to that Description; and one Question, that was made, is, whether that Book is to be taken to be Part of the Will as to the real Estate.

The Two concluding Clauses of the Will, which must be taken as speaking from the Moment of the last Re-publication, have Reference to the Book, which has been produced; and it was particularly pointed out by Mr. Preston, that in one of these Codicils, proved in the Ecclesiastical Court, the Testator takes Notice of the Place, where he wishes to be buried. Upon this Question the Judges have certified

certified their Opinion, that this Book cannot be resorted to for the Purpose of explaining, who are the Persons, intended to take; and I take them to have expressed their Opinion so, in order to avoid concluding the Question, whether that Book might be resorted to as Evidence of the Reputation, to fix the Character of Children upon these Three Devisees. I say nothing at present upon that Question; as I remain of the Opinion I expressed; that I find no Authority to justify me in holding, that this Book with reference to the Devisees can be taken as Part of the Will as to the real Estate. It is not necessary to examine, how far all the *Dicta* to be found, where a Will, attested by Three Witnesses, refers to an antecedent Paper, can be supported: but there was no Period of this Testator's Life, in which it could be asserted, that, if he had died at that Moment, any Book whatsoever would have formed Part of his Will. The Book was ambulatory to the last Moment of his Existence; and it is impossible upon the Principle of the Case of *Smart v. Prujean* (a) to maintain, that this Book was Part of the Will as to the real Estate. If it could have been so considered, it would not have been necessary to consider the other Question upon the Will; as those Papers would have given a distinct Description of the Persons intended; but, if they are not to be taken as Part of the Will, it is necessary to consider the Testator's Meaning, as it is to be collected agreeably to the Rules of Law upon the Will itself.

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This is, as I have observed, the Will of a Man, married, his Wife living at the Time, having no legitimate Children; but Three Infants sufficiently proved to be at that Time his reputed Children by *Ann Lewis*. The Question is, whether those Three Children, who had gained the Reputation of being the Children of this Testator previously to

(a) 6 Ves. 560.

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"Child," &c.  
*prima facie*  
means legiti-  
mate.

the Will, can take the Property, devised by these Words; being illegitimate; or whether the Construction is not to be such Children as he might have by *Ann Lewis* legally; in case his Wife should die; and he should marry *Ann Lewis*, and have legitimate Children by her.

The Rule cannot be stated too broadly, that the Description, "Child, Son, Issue," every Word of that Species, must be taken *prima facie* to mean legitimate Child, Son, or Issue: but the true Question here is, whether it appears by what we call sufficient Description, or necessary Implication, that the Testator did mean these illegitimate Children; and, to view the Case as accurately as is necessary for the Purpose of a Determination of that Question, we must consider, what would have been the Effect, not only with reference to Children who had at the Time of making the Will gained the Reputation and Character of being his Children, but also as to future illegitimate Children; who, though not to be considered as his Children at the Moment of their Birth, might have acquired that Character before his Death; and we must see, what would have been the Effect; if it had happened, that, surviving his Wife, he had married *Ann Lewis*; and had legitimate Children by her. The Case has been very ably argued upon the View of all these Events.

In all the Cases, that I have seen, having Relation to this Question, the illegitimate Children, if they were to take, must have taken, not by any Demonstration, arising out of the Will itself, but by the Effect of Evidence *dehors*, read, or attempted to be read, with a View to establish, not out of the Contents of the Will, but by something extrinsic, who were intended to be the Devisees; and if my Judgment upon this Case is supposed to rest upon any Evidence out of the Will, except that, which establishes the Fact, that there were Individuals, who  
had

had gained by Reputation the Name and Character of his Children, that Conclusion is drawn without sufficient Attention to the Grounds, on which the Judgment is formed: my Opinion being, that, taking the Fact as established, that there were Children, who had gained the Reputation of being his Children, it does necessarily appear on the Will itself; that he intended those Children. If that Principle is just, and this Case falls within its Reach, all the Cases cited are inapplicable to this.

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In the Case of *Godfrey v. Davis* (*d*), whatever was proved in the Cause, nothing resulted from the Will itself, shewing, that the Testator knew those Circumstances, which were reasoned upon. There is no Doubt, that Child might have been *Persona designata*: but the Question was, where the Will furnished nothing but the general Description "the Child of *William Harwood*," those Terms were a sufficient Indication of that Intention. The Question then, consistently with that Case, will be, what is necessary in a Will, describing the Devisee under the general Term "Child," to enable the Court to say, there is sufficient in that Will particularly to point out, and manifestly and incontrovertibly to shew, that the Testator intended a natural Child; taking the whole Description together. With that Decision I perfectly agree: my Opinion being, that there was not enough in that Will to shew, that the natural Child was the *Persona designata*. *Harwood* was a single Man; who might marry; and might have legitimate Children: but the Question in this Case is as to a Man, married at the Time of making the Will; and stating incontrovertibly, that he thought his Wife would survive him. What could he mean by describing these as his Children: the Children of a Person, who, it is plain, supposed, he should die, before he could get rid of the Connection he had by Marriage with another Woman.

(a) 6 Ves. 43.

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The Case of *Cartwright v. Vandry* (a) also appears to me to be rightly decided: by the Language of the Will in that Case the Testator appears to have had in Contemplation, that there might be more, or fewer, Children at her Death than there were, when he made his Will: which is very material to this Case. Though, it is true, there were Three legitimate Children, and One illegitimate, the Circumstances of the Direction to apply the Income in Fourths can only afford a Conjecture; as, if between the Time of his Will and his Death One or Two of these Children had died, the Division in Fourths would have been just as inapplicable, as it was in the Case, that happened. The Question therefore only comes to this; whether the single Circumstance of his directing the Maintenance in Fourths compelled the Court to hold by necessary Implication, that the illegitimate Child was to take by Implication with the others, as much as if she had been in the clearest and plainest Terms *Persona designata*; and my Opinion is, that this Circumstance is by no Means sufficient. That Testator, it is clear, had made a Will, which, though his Death followed so quick, would have operated in Favor of all his Children, however numerous they might have been; and in favor of subsequent legitimate Children, even if every legitimate Child he had before had died. It was therefore impossible to say, he necessarily means the illegitimate Child; as it is not possible to say, he meant those legitimate Children. That Will would have provided for Children, living at the Time of his Death, though not at the Date of his Will. It could not be taken to describe Two Classes of Children, both legitimate and illegitimate. Without extrinsic Evidence it was impossible upon the Will itself to raise the Question. The Will itself furnished no Question, whether legitimate or illegitimate Children were intended: but the Question, upon which the Court was to decide, was furnished by Matter, arising out of, not in, the Will.

(a) 5 Ves. 530.

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The Case of *Kenebel v. Scrifton* (*a*) had for a considerable Time very great Weight with me upon this Question. The Point, immediately before the Court, was, whether the Will of that Testator, who was an unmarried Man, was revoked by his Marriage and the subsequent Birth of Children. The Opinion of the Court, consistently with former Authorities was, that, as Marriage alone will not revoke a Will, though, connected with the Birth of a Child, it will, yet those Two Circumstances would not have that Effect; the Will containing a Provision for Children, if the Testator should have any.

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Marriage alone not a Revocation of a Will; as with the Birth of a Child it is.

Exception, where the Will provides for Children.

Upon what can be collected from what was said by the Court and from the Argument, there was nothing upon the Face of that Will, raising a necessary Implication, that legitimate Children were not to take; or that legitimate and illegitimate Children could not take together, as it has been argued here, under the same Description. It would be very difficult to make out, that they can so take: but that was not a Difficulty, with which the Court had to contend in that Case. If the Court had thought, that those Words meant illegitimate Children, the necessary Effect of the subsequent Birth of Children would have been, that the Will would have been revoked. We may conjecture, that he meant illegitimate Children, if he did not marry: yet notwithstanding that may be conjectured; the Opinion of the Court was, as mine is, that, where an unmarried Man, describing an unmarried Woman as dearly beloved by him, does no more than making a Provision for her and Children, he must be considered as intending legitimate Children; as there is not enough upon the Will itself to shew, that he meant illegitimate Children; and my Opinion is, that such Intention must appear by necessary Implication upon the Will itself.

(a) 2 East. 530.

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Implication.

Necessary Implication imports, not natural Necessity,

but so strong Probability, that an Intention to the contrary cannot be supposed.

Bastard may take by Purchase, if sufficiently described; and having acquired the Reputation of the Child of that Person.

With regard to that Expression "necessary Implication," I will repeat what I have before stated from a Note of Lord Hardwicke's Judgment in *Coriton v. Hellier*; that in construing a Will Conjecture must not be taken for Implication: but necessary Implication means, not natural Necessity, but so strong a Probability of Intention, that an Intention contrary to that, which is imputed to the Testator, cannot be supposed.

I do not notice *Earle v. Wilson* (a) and all the other Cases; as they only go to this; that the Description of Son, Child, &c. means *prima facie* legitimate Son, &c.; and all the Cases, from the Passage in Lord Coke (b), establishing, that a Bastard may take by Purchase, if sufficiently described, amount to no more than he must make that out upon the Will itself.

It was stated with great Force, that a Decision in favor of these Children would introduce Evidence, which no Court ought to endure; that the Mother must be called, for the Purpose of enquiring from her, whether the illegitimate Children were begotten by the Testator, or by other Persons. That is not so. All the Cases, which negative the Possibility of a natural Child taking under the general Description of "the Child, of which A. is *ensient* by me," &c. are Authorities, that this is not the Species of Evidence, by which the Court enquires, who are meant: but the Evidence of that is, that A. has acquired the Name and Character of Son, or Child, by Reputation; and, whatever Disappointment it may be supposed a Testator would feel, if, having had no Concern with the Creation of that Child he could see what was going on, yet, that Child, if it had obtained the Reputation of being his Child, would take under that Description; though if he had been aware of the real Fact, he would

(a) 17 Ves. 528.

(b) Co. Lit. 3. b.

have

have prevented that by an Alteration of his Will: but the true Question is, had the Child acquired a Name and Character, that entitled the Court to say, that Child is the Person to take?

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It was stated, very ably, that this might have done, if the Description had been by a Nick-name, a bodily Infirmitiy, the Place of Birth, or Residence, of the Child; and it seems to be admitted, that, if the Testator had spoken of his Three Children by *Ann Lewis*, that would have done: but it is said, they cannot be described as a Class. If that Description would have done, the Ground must be, that the Evidence establishes, who are to take by Reputation: not as Evidence of the Fact. If you are to enquire, who was the Father of the Children, you must do so in the same Manner, when he does not state their Number: but in that Case also, if it can be proved, that there are Three Children, who had acquired the Reputation of being his Children, they would take; and, if he had mentioned Three Children, and only Two could be found, who had the Reputation of being his, those Two only would take; though Three were mentioned; not being expressly named in his Will.

It was strongly urged farther, that though he might give to Three Children by a Description, amounting to *designatio Personarum*, he could not give to natural Children, as a Class; supposing he had used those Words, instead of any equivalent Expression. Upon that Question, whether he could give to natural Children, as a Class, whatever might have been my Opinion, if this were *res integra*, the Case of *Melham v. The Duke of Devon* (*a*), which has determined, that a Testator may give to natural Children, as a Class, has never been disturbed; and if it is to be now disturbed, this is not the Place for that.

(a) 1 P. Will. 529.

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It is farther contended however, that, if natural Children, then born, may take as a Class, future natural Children cannot. It is quite unnecessary now to decide that Question. Here are no after-born Children; and, with regard to the Expression "which I may have", though obviously future, yet upon the whole it is clear, that by those Words the Testator meant to describe Persons then, at the Date of the Will, in Existence. Whether the Cases cited from Lord Coke (*a*), which are all Cases of Deeds, have necessarily established, that no future illegitimate Child can take under any Description in a Will, whether that is to be taken as the Law, it is not necessary to decide in this Case. I will leave that Point, where I find it, without any Determination. It was farther argued with great Force, that, if this Testator had lived until the Death of his Wife, as he did, and had afterwards married *Ann Lewis*, and had legitimate Children by her, those Children must have taken; and legitimate and illegitimate Children cannot both take under the same Description; and it would be very difficult to persuade me, that they can: but, if my Opinion is right, that upon the Contents of this Will the Testator is proved to have intended illegitimate Children, that Question never could have arisen; as then, though the Devise is to illegitimate Children, Marriage and the Birth of legitimate Children would have the same Effect as upon a Devise to any Stranger.

The Question therefore comes round to this; whether upon the Contents of this Will, it is possible to say, he could mean at the Time of making that Will any but illegitimate Children: a married Man; with a Wife, who, he thought, would survive him; providing for another Woman, to take after the Death of his Wife, and for

(a) *Co. Lit. 3. b.*

Children

Children by that Woman: it is impossible, that he could mean any Thing but illegitimate Children; and, if that Devise would have comprehended legitimate Children, that would be by an Operation of Law, that would have been an entire Surprise upon him; as he could not mean legitimate Children by this Will. If the Will itself shews that, without any other Evidence than what proves, who were reputed to be his Children, and, that being established, the Will itself shews, he meant to provide for them, so providing for them as necessarily to shew, that they are his Devisees, there is no Authority, that the Devisees, whose Character is so necessarily to be collected from the Will, are not capable of taking.

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The Conclusion is, that these Three Children are upon the Will itself, the whole taken together, without looking at the Book, entitled to take as the Devisees of this Testator.

The Injunction was dissolved; and the Bill dismissed (*a*).

(*a*) *Swaine v. Kennerley, post.*

SWAINE v. KENNERLEY.

1813,
Feb. 7.

JAMES Swaine by his Will, dated the 24th of August, 1796, devised his real Estates to John Kent and Samuel Kennerley, their Heirs and Assigns, upon Trust Under the Description of "Children" in a Will illegitimate Children, existing at the Date of the Will, not entitled, unless proved by the Will itself to be intended; and Evidence can be received only for the Purpose of collecting, who had acquired the Reputation of Children.

An only legitimate Son therefore held entitled as Devisee.

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by Mortgage or Sale to raise the Sum of £2100, and lay out the same in their own Names in the Purchase of Freehold Lands, &c. and settle the same to the Use of all and every the Child and Children of the Testator's late Son *Thomas Swaine* deceased equally to be divided between or amongst them, to hold as Tenants in Common and not as Joint Tenants; and to the respective Heirs of the Body or Bodies of all and every such Child and Children issuing.

The Testator's Son *Thomas Swaine* left Three Children: of whom the Plaintiff only was legitimate: the other Two *Thomas* and *John Swaine* being born before Marriage. The Bill prayed a Declaration, that the Plaintiff was entitled as Tenant in Tail in Equity to the whole £2100, &c. All the Children were living at the Date of the Will.

Mr. Hart, and Mr. Roupell, for the Plaintiffs; and Sir Samuel Romilly, and Mr. Agar, for the Defendants, declined to argue this Case; as it must depend upon the Decision of *Wilkinson v. Adam* (a). After that Decision this Cause was set down for Judgment.

The Lord Chancellor.

Upon looking into the Papers in this Cause I am clearly of Opinion, that no Person except the legitimate Child can take under this Devise, for this Reason; that the Will itself does not prove, that the Testator meant an illegitimate Child; and according to the Opinion, expressed in *Adam v. Wilkinson*, I cannot go into the Circumstances of Evidence to raise a Construction. The Will must prove, that illegitimate Children are intend-

(a) *Ante*: the preceding Case.

ed;

ed; and extrinsic Evidence can be received only for the Purpose of collecting, who had acquired the Reputation of being Children of the Person, named in the Will.

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The Decree was made accordingly.

BULLOCK v. FLADGATE.

ROLLS.

1813,

March 13. 15.

THE Bill was for a specific Performance of a Contract for the Sale of an Estate. The Answer, submitting to perform it, if the Plaintiff could make a good Title, stated, that by the Abstract it appeared, that by Indentures, dated the 18th and 19th of November, 1763, on the Marriage of *Elizabeth Lant* and *John Bullock*, Sir *John Philips* by the Direction of *Elizabeth Lant*, in whom the Estates were by a former Settlement and Will vested in Fee-simple, conveyed to *Francis Boller*, *George Elliot*, and *John St. Leger Douglas*, upon Trust after the Marriage to permit *Elizabeth Lant* during her Life to receive the Rents and Profits for her separate Use, and after her Decease, leaving Issue by *John Bullock*, to the Use of *John Bullock* for Life; with Remainder to the Use of *Boller*, *Elliot* and *Douglas*, and their Heirs, during the Life of *John Bullock*, upon Trust to preserve Contingent Remainders; with Remainder to the Use of the first and other Sons of the Marriage successively in Tail, and of the Daughters, as Tenants in Common in Tail; and for Default of such Issue to the Use of such Person or Persons, and for such Estate and Estates as *Elizabeth Lant* should notwithstanding her Coverture by any Writing under her Hand and Seal, attested by Two or more credible Witnesses,

Effect of a private Act of Parliament, declaring an Estate vested in Trustees and their Heirs in Trust to sell, discharged from the Trusts of a Settlement; devesting the legal Fee, outstanding under a prior Settlement.

Power to appoint Estates, to be purchased with Money, produced by the Sale of other Estates, well executed by an Appointment, operating directly on the original Estates.

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nesses, or by her last Will and Testament duly executed, appoint; and, in Default of such Appointment, to the Use of *Elizabeth Lant*, her Heirs and Assigns for ever,

By a private Act of Parliament, 12 Geo. 3, reciting the Settlement of 1763, it was enacted, that the settled Estate should from the 1st of July, 1772, be vested in *John Saint Leger Douglas* and *John Cook*, their Heirs and Assigns, freed and absolutely discharged from all the Trusts, Estates, Charges, &c. in the Settlement limited, upon the Trusts following: that the Trustees should with the Consent and Approbation of *John Bullock* and *Elizabeth* his Wife in Writing make sale, dispose of, and convey, the Premises; and lay out the Money, so arising, in the Purchase of Estates in Fee-simple, to be settled to the same Uses as declared in the Settlement; and that the Persons, to whom the Trustee should sell, should hold and enjoy "freed and absolutely acquitted, exonerated, and " discharged, of and from all and every the Uses, Trusts, " Estates, Charges, Powers, Provisoes, Limitations and " Agreements, in the said hereinbefore recited Indenture " of Settlement, made on the Marriage of the said *John* " *Bullock* and *Elizabeth*, his Wife, limited, provided, " declared, or agreed, of and concerning the said Pre- " mises respectively;" and that the Receipts of the Trustees should be sufficient Discharges to the Purchasers, &c.

It was farther enacted, that until the Sale the Trustees should stand seised of the Premises, so vested in them, in Trust to permit and suffer the Rents, Issues and Profits, to be received and taken by the Person, who ought or would have been entitled to receive the same, in case that Act had not been made. The Act contained a Clause, saving to the King and all other Persons (except *John Bullock* and *Elizabeth*, his Wife, and their Issue, and the Heirs and Assigns of *Elizabeth Bullock*, and the Trustees in

in the Marriage Settlement, their Heirs, &c. and all Persons, claiming any Use, Estate, Trust, &c. in the Property by virtue of the Settlement, and their respective Heirs, &c.) all such Estates, Rights, Titles, Interest, &c. as they had before passing the Act, or would have had, in case the same had not passed.

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No Part of the Estate having been sold according to the Directions of the Act, *Elizabeth Bullock* by her Will, dated the 31st of *January*, 1780, and duly attested, devised and appointed the Premises to the Use of *Sir James Lake* and the said *John Cook*, their Heirs and Assigns, in Trust for *John Bullock* for Life, and after his Decease in Trust that *Lake* and *Cook*, or the Survivor of them, his Heirs or Assigns, should sell; and apply the Money, arising therefrom, in the first Place in Payment of several Legacies; and the Residue to and amongst all and every the Child and Children of the Plaintiffs, *Jonathan Josiah Christopher Bullock* and *Juliana Elizabeth*, his Wife, who should be living at the Death of the Testatrix's Husband, and to his, her, and their, Executors and Administrators equally, &c.

By Indentures dated the 12th and 13th of *May*, 1780, *Bullock* and his Wife conveyed the Estates to *Sir James Lake* and his Heirs, to the Use of *John Bullock* for Life; with Remainder to the Use of *Douglas* and *Cook* and their Heirs, during the Life of *John Bullock*, upon Trust to preserve Contingent Remainders; with Remainders to the Use of *Elizabeth Bullock* for Life, and the first and other Sons successively in Tail, and the Daughters, as Tenants in Common in Tail; Remainder to the Use of such Persons, and for such Estates, as *Elizabeth Bullock* whether *cocert* or *sole*, by Deed or Writing by her sealed and delivered in the Presence of and attested by Two or more Witnesses, or by her Will, or any Writing purporting

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ing to be her Will, signed by her in the Presence of and attested by Three or more Witnesses, should direct, limit, or appoint, and, in Default thereof, to the Use of the Plaintiff *Juliana Elizabeth the Wife of Jonathan Josiah Christopher Bullock*, her Heirs and Assigns for ever.

Elizabeth Bullock died in 1793; never having had Issue, or made any Appointment under the Power, reserved by the Deeds of *May, 1780*; and, being illegitimate, she left no Heir.

By Indentures, dated the 13th and 14th *June, 1800*, the Plaintiffs *Jonathan Josiah Christopher Bullock* and *Juliana Elizabeth*, his Wife, conveyed to *Charles Arnold* and his Heirs; to hold, subject to the Life Estate of *John Bullock*, to the Use of *Sir James Lake* and *John Cook*, their Heirs and Assigns for ever, upon and for so many of the Trusts, Ends, Intents and Purposes, &c. by the Will of *Elizabeth Bullock* expressed, as were then existing undetermined and capable of taking Effect. Since the Execution of those Deeds *John Bullock* died.

The Answer submitted, that under the Circumstances *John Bullock* and *Elizabeth* his Wife had not, nor had either of them, ever any Power to appoint the equitable Reversion in Fee-simple of the Premises, expectant on the Determination of the precedent equitable Estates, created by the Marriage Settlement; and that the legal Estate in Fee-simple was not vested by the Act of Parliament in *Douglas* and *Cook*, or either of them; but after that Act passed remained vested in *Elizabeth Bullock*; and had escheated to the Crown; and, if *John* and *Elizabeth Bullock*, or either of them, ever had, before the Act passed, any Power to appoint, the equitable Reversion in Fee-simple, the same Power could not be exercised after the Act passed.

Sir

Sir Samuel Romilly, Mr. Leach, and Mr. Trower, for the Plaintiffs, contended, against the first Objection of the Purchaser, that the legal Fee, remaining in *Elizabeth Bullock*, had by her Death without Issue escheated to the Crown, that the Object of the Act of Parliament was to vest the Estate in the Trustees to sell; giving them, not such Estate as the Trustees under the Settlement had, but an absolute Estate in Fee, devested of all the Uses and Equities under the Settlement; that they might convey the absolute Fee to a Purchaser:

Secondly, to the Objection, that the Power of Appointment was not over the Estates, originally settled, but over those only, directed to be purchased with the Money, produced by the Sale, that Mrs. *Bullock* had a Right to elect, that the Sale, which was to take place only with her Consent, should not be made; according to *Pearson v. Lane* (a); and her Power operated equally upon the original Estates, not sold.

Mr. Hart, Mr. Bell, and Mr. Shadwell, for the Defendant.

Though the legal Estate was intended to be transferred to the Trustees by the Settlement of 1763, and the Conveyance was calculated to have that Effect, nothing passed but an equitable Interest: the legal Estate remaining in *Elizabeth Bullock*, in whom it was then vested, has in the Events, that have taken place, escheated to the Crown; and there is no Jurisdiction to enforce the Equities, that may subsist against Individuals. In all such Cases a private Act of Parliament is considered merely as a Form of Conveyance, removing Disabilities; but con-

(a) 17 Ves. 101.

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strued upon the same Principle as ordinary Conveyances to be controlled and regulated by the Object of the Parties, with reference to the Nature of the Subject. The sole Object was to convey the Estates, discharged of the prior Uses and Trusts; in other Words to extinguish all those Trusts and Uses. In the Construction of such an Act the Court understands the Legislature as intending no more than to transfer such Title as the Parties are stated to have had vested in them. There was no Intention to transfer any legal Estate from Mrs. Bullock; who, it is assumed, had not the legal Estate. The whole Effect therefore was to transfer to Trustees for Sale such Estate as the other Trustees had, discharged of all the Trusts of the Settlement. The Case of *Pearson v. Lane* has no Application. The Court is pressed to give to this Act of Parliament, which has totally annihilated the Power of Appointment, an Operation beyond the express Declaration of its Object; which is limited to vesting the Estates in Trustees cleared from all the Trusts of the original Settlement; leaving all other Interests, as they stood: consequently leaving in Mrs. Bullock the Estate in Fee, which none of the Parties contemplated as being in her. In *Westley v. Clarke* the Parties, who applied for the Act of Parliament, being Tenants in Tail, might have barred the Estates by their own Act: but Mr. and Mrs. Bullock were only Tenants for Life.

The MASTER of the ROLLS.

March 15.

Two Objections are made to this Title: first, that the legal Estate was not vested in the Trustees under the Act of Parliament: secondly, that the Appointment by Mrs. Bullock of the beneficial Interest in this Property is not a valid Appointment. By the Act the Property is settled upon

upon and vested in *Douglas* and *Cook*, their Heirs and Assigns. There is nothing imperfect or ambiguous in that Enactment: whatever Mistake there might be with regard to the Persons, in whom the legal Estate was before vested. The clear Intention of the Legislature, and of the Parties, was, that it should then be placed in these Trustees. The Clause does not take the Estate out of this, or that, particular Person; but vests it by general Words; which must have their Effect against all, and upon the Estates of all, whose Rights are not saved by the subsequent Part of the Act: consequently as against Mrs. *Bullock* and her Estate just as much as they would have had against *Douglas* and *Elliot*, if the Estate had been vested in them.

But it is said, the Effect of these Words is qualified and restrained by the added Words " freed and absolutely acquitted, exonerated, and discharged, of and from all and every the Uses, Trusts, Estates, Charges, Powers, Provisoes, Limitations and Agreements, in the said hereinbefore recited Indenture of Settlement."

The Argument, as I understand it, is, that the Estate is vested in these Trustees no farther, and to no other Effect, than to free it from the Trust and Limitations of the Marriage Settlement; and Mrs. *Bullock*'s Estate in Fee not being derived under that Settlement, but having Existence independently of it, was not affected by the Act. There is however nothing restrictive or qualifying in these Words which seem rather to be added for the Purpose of Amplification, to express how large and absolute an Estate the Trustees were to take. It is declared, unnecessarily and superfluously perhaps, that the Trustees should not only have the Estate vested in them, but so vested as to be freed and discharged from the Trusts of the Marriage Settlement: the only Trusts, to which it was supposed it could be subject. That is very different from vesting it in them

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them to the Intent only of being freed, and for the single Purpose of freeing it, from those Trusts.

With regard to Mrs. Bullock's Power of Appointment it is clear, that it depended upon Default of Issue of the Marriage: not, as was attempted to be argued, on there being Issue living at her Death, which should afterwards fail. The only Reason for applying for the Act was the Possibility of the Existence of Issue of the Marriage. Putting them out of the Question, none having been born, there was no one but Mr. and Mrs. Bullock, who had any Interest in converting the Estate into Money, and with that Money purchasing other Lands. If that had been done, it is admitted, that the Estate purchased would have been subject to her Power of Appointment. I apprehend, that Equity will uphold an Appointment of the Estate itself as amounting substantially to the same thing; on which Principle it is that Appointments, deviating considerably from the letter of the Powers, under which they were made, have frequently been supported.

It has been held, that a Power to appoint an Estate in Land includes a Power to dispose of the Estate, and appoint the Produce: the same Effect has been given in the more doubtful Case of a Power to charge an Estate; and a Power to appoint the Money produced by an Estate, directed to be sold, has been considered as a Power to appoint the Estate itself. During all the Litigation, in the Case of *Standen v. Standen* (a), it was never doubted, that the Widow had the Power to appoint the Estate itself: the only Question was, whether her Will was a valid Execution of that Power: yet the Testator had directed the Estate to be sold; and the Letter of the Power was confined to the Produce of the Sale.

(a) 2 Ves. jun. 589.

Power to appoint an Estate includes a Power to dispose of the Estate and appoint the Produce.

The same Effect has been given in the more doubtful Case of a Power to charge; and a Power to appoint the Money, produced by an Estate, directed to be sold, has been considered as a Power to appoint the Estate itself.

Supposing

Supposing Mrs. Bullock's first Appointment good, as I think it was, there is no Difficulty upon what afterwards took place; the Parties interested against her Appointment having by Arrangement among themselves agreed to give Effect to it.

There is no Ground therefore for either of these Objections; and the Plaintiff must have a Decree for a specific Performance:

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PARNELL v. LYON.

ROLLS.
1813,

March 5. 8.
Condition requiring the Consent of Executors to Marriage not applied to a Daughter, married in the Testator's Life with his Consent or subsequent Approval.

WILLIAM Barton by his Will, dated the 30th of September, 1800, bequeathed all his personal Estate to Trustees upon Trust to be converted into Money; and, after satisfying his Debts, &c. to be invested and the Interest applied unto and equally amongst his Son William and Daughters Elizabeth, Mary, and Margaret; One-fourth Part of the Principal to be paid unto his Son, when he should attain Twenty-one; and One-fourth Part, unto each of his Daughters, when and as they should respectively attain the Age of Thirty Years; and in case any of them should die in the mean Time leaving Issue, then he directed that the Part or Share of him or her so dying should go and be divided unto and equally amongst such Issue: but if any of them should die without Issue, the Part or Share of him or her so dying should go and be directed, divided equally amongst such of them as should be then living and the Issue of such of them as should be then dead. He farther declared his Will to be, that, if any of his Daughters should marry, before they should attain the Age of Thirty Years, with the Consent and Approbation of any Two of his Executors, or of any One of his Executors,

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cutors, if there should be but One then living, her Fourth Part or Share of the Principal Money then out at Interest should immediately become vested in her, and be forthwith paid to her, her Executors, Administrators, or Assigns; and that if any of his Daughters should marry without the Approbation and against the Consent of Two of his Executors, or One of them, if there should be but One then living, her Fourth Part or Share of the said Principal Money and all contingent Sums should be continued out at Interest during her Life; and the Interest thereof should be yearly paid to her; but the Principal should go unto, and be equally divided amongst, such of her said Brother and Sisters as should be then living, and the Issue of such of them as should be then dead.

The Testator's Daughter *Elizabeth* married the Plaintiff *Parnell* in her Father's Life-time, in *February*, 1810: she attained Twenty-one in *July* following; and the Testator died in *August*, 1810.

The Bill alleged, that the Marriage had taken place with the Testator's Consent and Approbation, with whom his Daughter *Elizabeth* afterwards lived upon the same Terms as before her Marriage; and, submitting that immediately upon the Testator's Death she became entitled to an absolute Interest in One-fourth of the Residue of his personal Estate without waiting to attain the Age of Thirty, prayed a Declaration accordingly.

The Executors by their Answer denied, that the Marriage took place with the Consent or Approbation of the Testator; and that *Elizabeth* afterwards lived with him upon the same Terms of Affection as before her Marriage: on the contrary insisting, that the Marriage was against his Approbation, and that after the Marriage he had shewn a Disposition to prevent the Plaintiff, the Husband, from receiving

receiving the Provisions intended by the Will for *Elizabeth*.

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The Plaintiffs entered into no Proof.

Mr. Hart, and Mr. Horne, for the Plaintiffs, contended, that the Plaintiff *Elizabeth* became entitled to her Legacy absolutely the Moment of the Testator's Death; having previously attained Twenty-one; that, though the Answer attempts to throw some Doubt upon the Father's Consent, and the Terms, on which she lived with him after her Marriage, he made no Alteration of his Will; which he scarcely would have suffered to stand, had he disapproved the Connection: the Condition, therefore, was virtually complied with; and the Consent of the Executors must be construed as a Provision, to operate only in the Event, that his Daughters should not marry in his Life-time; in which the Executors were to stand *in loco Parentis*.

Mr. Richards, and Mr. Bell, for the Defendants.

The Plaintiff is not absolutely entitled; unless she lives to the Age of Thirty. Nothing can be clearer than this Clause of the Will; expressly requiring the Consent of the Executors; not providing for a Marriage with the Testator's Consent in his Life-time. The Court cannot insert Terms, which would render his Consent equivalent: but the Executors positively deny, that the Marriage took place with the Testator's Consent: and the Plaintiffs have produced no Evidence to shew that. The Event, therefore, has not happened, upon which she was to take. No Maxim is clearer, than that in the Case of a Condition precedent, if it be impossible, the Property never shall vest (a). Marriage in this Instance with the Consent of the Executors

(a) Co. Litt. 206; agreeing in Substance with the Rule of the Civil Law, distinguishing between Conditions

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Executors was a Condition precedent; which must have been complied with to give the Legatee the Property at the Age of Twenty-one. The Argument, that this is an Interest, to be enlarged on the Performance of a Condition, is not more favorable to the Plaintiffs: the Condition, being precedent, must be performed to have the Effect contended for.

*Mr. Hart, in Reply.*

The Object of the Testator, collected from the whole Will, was to prevent an improvident Marriage before the Age of Thirty; providing the Consent of those, better qualified to judge of the Prudence of the Connection than young and inexperienced Women. Can it be conceived, that he intended any Thing more than a Substitution of the Judgment of others after his Decease; not precluding his own Judgment, while living? In Substance this resembles the late Case of *Coffin v. Cooper*. The Testator gave the Residue of his Property to his Children at Twenty-one; adding a Proviso, that if any of his Daughters married with the Consent of his Trustees, such Daughter was to take immediately Two-thirds of her Portion, the other Third to be settled to her separate Use: if without such Consent; then making a different Disposition. One of the Daughters married in the Testator's Life-time, without his Consent: but he afterwards approved the

tions impossible, and difficult to perform:—*Plane conditio difficilis huc non pertinet, quantumvis propter Personæ, cui apposita est, qualitatem aliam causam videatur impossibilis: sed nisi conditioni pareatur, reliquum in testamento*

*non capitur. Finge Libertatem Servo relictam hac conditione, "Si heredi millies de- " derit." Hic non detrahitur conditio, sed inutilis erit datio libertatis, &c. (Vinn. Com. Just. Inst. l. 2. t. 14.)*

Marriage

**Marriage.** The Court considered the Clause substantially complied with (*a*).

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LYON.

*The MASTER of the ROLLS.*

Supposing, for the Sake of the Argument, that Mrs. Parnell married with Consent of her Father, it is difficult to conceive, however the Will may be expressed, that he could mean a less beneficial Provision for her, than if she had married after his Death with Consent of his Executors. A Husband, approved by them, would have been let into the immediate Possession of her Fortune; for such is the Effect of making it payable to her on her Marriage with their Consent. It would be strange, that he should have meant, that a Husband, approved by himself, should be in so much worse a Condition, as to have only the Interest, until she should attain the Age of Thirty, and no Part of the Capital in the Event of her Death under that Age. His Intention must have been that upon a proper Marriage the Daughter should have her Portion: but in Words the Testator has spoken only of a Marriage, taking place after his Death; that being the only Marriage, the Propriety of which could be ascertained by the Consent of Executors. It is impossible however, that he could intend, if the Propriety of the Marriage should be ascertained by himself, that the same Effect should not be produced: but certainly there is some Difficulty upon the Words. It is therefore satisfactory to find, that the Construction, which the Reason of the thing seems to require, is sanctioned by Authority. In *Clarke v. Berkeley* (*b*) under a Devise upon Trust to convey to the Testator's Daughter, in case

March 8.

(*a*) *Clark et ux. v. Lucy*, restraint of Marriage, generally, see *Clarke v. Parker*, *MS. 5 Vin. Ab. pl. 6. Prodgers v. Langham*, 1 Sid. 133. 18 Ves. and Cases there cited.  
1 Keb. 486. On Conditions in (*b*) 2 Vern. 720.

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she married with the Consent of Two of the Trustees and her Mother, and if she died before Marriage, or married without such Consent, to other Uses, the Daughter having married in her Father's Life-time with his Consent, Lord Couper decreed a Conveyance according to the Will; declaring, that the Condition was dispensed with by having the Testator's own Consent; which was more to be regarded than the Consent of Trustees, to whom he had delegated a Power to consent in case of Marriage after his Decease. In *Crommelin v. Crommelin* (a) Lord Rosslyn proceeded upon the same Principle; holding such a Condition not applicable to a Daughter, who married, and became a Widow during her Father's Life.

Upon the Authority of these Two Cases, therefore I hold, that, if this was a Marriage with Consent of the Father, it is equivalent to Marriage with Consent of the Executors after his Death; and would equally entitle her to Payment of the Portion.

It is said, it ought to have been proved, that the Marriage was with his Consent; and in Strictness it ought: but in such a Case I shall direct an Inquiry into the Fact: the Master to state any special Circumstances.

Mr. Hart suggesting an Addition to the Inquiry, viz. whether the Father afterwards approved, the Master of the Rolls said, he meant that; and Mr. Richards said, it would come in under the Direction to state special Circumstances.

(a) 3 Ves. 227.

1813;
Feb. 11.
April 8.

BISCOE v. PERKINS.

VINCENT John Biscoe by his Will, dated the 7th of October, 1768, disposing of his Freehold, Copyhold, and Leasehold, Estates, to his Executors, until his Son Vincent Hilton Biscoe should attain the Age of Twenty-one Years, with Remainders in the Event of his Death without Issue Male under Twenty-one to the second and other Sons of the Testator, attaining Twenty-one, successively, proceeded in the following Manner:

" And my Will and Meaning farther is, that if my said Son *Vincent Hilton Biscoe* shall have attained his said Age of Twenty-one Years at the Time of my Death, or if he hath not then attained the said Age, then so soon after as he shall have attained his said Age, I do give and devise the said Freehold and Copyhold Messuages, &c. to my Executors hereinafter named and their Heirs, Executors and Administrators, for and during the Life of my said Son *Vincent Hilton Biscoe*, to the Intent to support the Contingent Remainders, in this my Will after limited, so that the same may not be destroyed; but in Trust nevertheless to permit and suffer him my said Son *Vincent Hilton Biscoe* to receive the Rents and Profits thereof to and for his own Use during his natural Life; and from and after his Decease then I devise the said Freehold and Copyhold Messuages, &c. to the first Son of the Body of my said Son *Vincent Hilton Biscoe* lawfully issuing, whether then born or unborn, and to the Heirs Male of the Body of such first Son lawfully issuing; and for Default of such Issue then likewise to the second, third, &c. Son of my said Son *Vincent Hilton Biscoe* successively and in Remain-

Trustee to preserve Contingent Remainders joining in a Recovery with the Remainder-man in Tail, having attained Twenty-one, held no Breach of Trust; and no Objection to a specific Performance.

Devide to Trustees, their Heirs, &c. for the Life of the Devisor's Son, to support Contingent Remainders, in Trust to permit him to receive the Rents for Life, and after his Decease to his first and other Sons in Tail: an equitable Estate in the Son: the legal Estate in the Trustees, with a legal Remainder to the first and other Sons.

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BISCOE
v.
PERKINS.

"der, the one after the other, &c.;" and in case of all such Issue Male failing then he gave and devised all the said Freehold, &c. to his Executors, their Heirs, Executors and Administrators, in Trust for the Use of and amongst all his Daughters, with Cross Remainders; and for Default of such Issue then to the Use of his own right Heirs for ever.

Vincent Hinton Biscoe, having attained Twenty-one, entered into Possession of the devised Estates. He afterwards married; and had Issue of that Marriage *Thomas Henry Biscoe*; who attained Twenty-one in March, 1812.

By Indentures, dated the 29th of May, 1812, *Edmund Calamy*, who under the Will of *Nathan Sprigg*, the surviving Executor and Devisee in Trust, had become the sole Trustee, and the Plaintiffs *Vincent Hilton Biscoe* and *Thomas Henry Biscoe*, conveyed to *George Law*, to the Intent that *Law* should become a Tenant of the Freehold; so that Two or more common Recoveries might be suffered to the Use of the joint Appointment of *Vincent Hilton Biscoe* and *Thomas Henry Biscoe*. Recoveries were accordingly suffered in Trinity Term, 1812; and soon afterwards *Vincent Hilton Biscoe* and *Thomas Henry Biscoe* joined in a Deed of Appointment; limiting the Estates, subject to an immediate Charge of £300 per Annum for the Son, to the Father for Life, without Impeachment of Waste; with Remainder to the Son in Tail: Remainder to Trustees for a Term of 300 Years, upon Trust, if he should die in the Life of the Tenant for Life, leaving Daughters and no Issue Male, to charge £20,000 for those Daughters; and, subject thereto and to a Charge of £12,000 for the Father's Benefit, in consideration of his having discharged the Son's Debts, limiting the Estate to the Father in Fee. This Settlement containing a Power for the Trustees to sell, &c. with the usual Declaration,

that

that their Receipts should be Discharges, &c. Under that Power the Estates were put up to Sale; and the Defendant became the Purchaser of one of the Lots.

1813:

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BISCOE

v.

PERKINS.

The Bill praying a specific Performance, the Defendant by his Answer objected to the Title; insisting, that *Calamy*, as Representative of the Trustees, having the legal Estate vested in him during the Life of the Plaintiff *Vincent Hilton Biscoe* for the Purpose of preserving the Contingent Remainders from being destroyed, had been guilty of a Breach of Trust in joining with *Vincent Hilton Biscoe* and *Thomas Henry Biscoe* in suffering a Recovery to defeat such Remainders; and that this Court would not permit a Recovery under such Circumstances to operate effectually to bar such Remainders.

Mr. Richards, Mr. Newland, and Mr. Polson, for the Plaintiffs.

The Question, whether these Recoveries were well suffered, the Trustee for preserving Contingent Remainders concurring with the Tenant for Life and the Tenant in Tail in destroying them, has been frequently before the Court; and was most compleatly discussed in *Moody v. Walters* (*a*): a Case, though different in Circumstances, the same in Principle as this. In that Case the Act of the Trustees, concurring in the Recovery, was not considered a Breach of Trust; and the Doctrine is laid down, that this Court had in some Instances directed a Trustee to concur in destroying Remainders, when the Object was a family Arrangement; as in *Freicin v. Charlton* (*b*), and *Winnington v. Foley* (*c*): but lately has interfered with Reluctance, unless before the Birth of a Tenant in Tail; after

(*a*) 16 Ves. 283.

(*c*) 1 P. Wms. 536.

(*b*) 1 Eq. Ca. Ab. 386,

pl. 4.

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 v.  
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that Event leaving it to the Discretion of the Trustees to join, or not; and admitting a Distinction between compelling them to join and treating them as guilty of a Breach of Trust in joining. The Tenant in Tail concurred in these Recoveries; and the general Rule is, that the Inheritance is bound, where the first Tenant in Tail is brought before the Court (*a*); which is not in the Habit of regarding the subsequent Interests. The Case of a Will or voluntary Settlement differs from a Deed for valuable Consideration or a Settlement before Marriage. The Object of these Recoveries is most provident; and such as a Trustee merely to support Contingent Remainders, until the Parties entitled came into Existence, might be compelled to concur in: by a joint Appointment to give the Tenant in Tail, who was dependent on his Father, an immediate Provision.

Sir Samuel Romilly, and Mr. Kenrick, for the Defendant.

This Question has never been decided in a Court of Equity; whether a Trustee, specially appointed to preserve the Contingent Remainders, shall be permitted to concur in destroying them without any Object, connected with the general good of the Family; the Object of these Recoveries being clearly no other than to destroy the Remainders, and sell the Estate. Where the only Purpose was to limit in strict Settlement, following and extending the original Destination of the Property and Object of the Parties, the Court has compelled the Trustee to join: but, though it is generally supposed, that the Trustee has a pure Discretion to concur, or not, and that, if he commits a Breach of Trust, a Purchaser cannot be affected, no Decision has sanctioned that Doctrine; and its Correctness may be questioned.

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(*a*) See 1 Sch. & Lef. 40S. *Lloyd v. Johnes*, 9 Ves. 57.

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BISCOE

v.

PERKINS.

April 8.

*The Lord Chancellor.*

This, which was set down as a short Cause, involves a Question of considerable Importance. The Will is very singular in its Construction; as in the Event of the Death of the eldest Son *Vincent Hilton Biscoe* under the Age of Twenty-one the Limitation is to second and other Sons successively: but if the eldest Son attained that Age, and had died afterwards without Issue Male, there is no Limitation whatever to the second, third, and fourth, Sons of the Testator: but in that Event the eldest Son takes either a legal or equitable Estate for Life, with Remainders to his first and other Sons; and in Default of Male Issue the Will provides neither for the younger Sons of the Testator nor for the Daughters of his eldest Son; but in that Event limits the Estates to the Daughters of the Testator with Cross Remainders.

The first Question is, whether *Vincent Hilton Biscoe* takes a legal or equitable Estate for Life: if the former, no Question can arise; a Recovery having been suffered upon his eldest Son's attaining Twenty-one. My Opinion however is, that he did not take a legal Estate. The Purpose, for which an Estate is in Terms at least given to the Executors and their Heirs, being to preserve the Contingent Remainders after limited, the Consequence is necessary, that for that Purpose they must have some Estate in them. That brings the Case to this; that this is a Devise to the Executors and their Heirs during the Life of the eldest Son upon Trust to permit him to receive the Rents and Profits for his Life: a Devise of the legal Estate to those Trustees, with a legal Remainder to the first Son of his Body; and they are Trustees, not only as to the Rents for the eldest Son for his Life, but also for preserving the Contingent Remainders after limited: those

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. PERKINS.

Trustees to  
preserve Con-  
tingent Re-  
mainders hono-  
rary Trustees :  
not to be com-  
pelled to join  
in destroying  
them.

The next Consideration is, in what Cases the Court will direct them to join; and, if I am to be governed by what my Predecessors have done, and have refused to do, I cannot collect, in what Cases Trustees would, and would not, be directed to join ; as it requires more Abilities than I possess to reconcile the different Cases with reference to that Question. They all however agree, that these Trustees are honorary Trustees ; that they cannot be compelled to join; and all the Judges protect themselves from saying, that, if they had joined, they should be punished ; always assuming, that the Tenant in Tail must be Twenty-one.

If this is to turn upon the Settlement, afterwards made, it was not improper under all the Circumstances, and the very peculiar Limitations of this Will. Therefore looking at this Settlement, and the Act having been done, even if, according to my Predecessors, I should not have directed them to join, I do not think I can say, they are guilty of a Breach of Trust.

This is not the Footing, upon which it ought to stand. If they are honorary Trustees to support Contingent Remainders for the Benefit of the Family, the Interests of Mankind require Courts of Justice to treat them as such; and, unless Violation of the Trust appears, not to take away all their Discretion ; and say, they are not to join, though their Opinion is, that the Interests of the Family require it, without coming to a Court of Equity ; the Effect of which is, as I observed in *Moody v. Walters*, that the *Lord Chancellor* and the *Master of the Rolls* are the Trustees of all the Estates in the Kingdom.

As I do not find here what I can call a Breach of Trust, my Opinion is, that this Contract must be performed ; and I will not go the Length of saying, that this is a Case, in which notwithstanding these Observations,

## CASES IN CHANCERY.

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servations, and though this is my Opinion, I cannot compel the Purchaser to take the Title: but I shall compel him to take it, unless he will reverse my Opinion. That was formerly the Course, instead of letting off a Purchaser upon a doubtful Title (*a*); and the Purchaser then went to the *House of Lords*. My Opinion is, that this Contract ought to be performed, but without Costs.

(*a*) *Stapylton v. Scott*, 16 *Ves.* 272, and the Refer-

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Biscoe
v.

PERKINS.

Formerly a Purchaser was not let off upon a doubtful Title; but was compelled to take it, or establish the Objection.

ADAM, *Ex parte*.

1813,
April 26, 27.

A COMMISSION of Bankruptcy issued against Five Persons, carrying on a joint Trade at *Sunderland*, under the Firm of *Samuel Cooke and Co.*; Two of those Five carried on a distinct Trade under the Firm of *Harrison and Goss*. The Firm of *Samuel Cooke and Co.* had drawn and negotiated Bills on that of *Harrison and Goss*; and under a Petition by the Holders of those Bills the Question was, whether they were entitled to prove against both Estates.

The Rule in Bankruptcy, that a joint and several Creditor must elect, does not apply to a Contract for double Security against distinct Firms: viz.

Bills drawn by all the Partners upon a distinct Firm, constituted of some of them.

Proof therefore against both Estates.

Mr. Leach, and Mr. Agar, in support of the Petition, relied upon the Firms and the Estates being distinct; and referred to the Cases collected by Mr. Cooke (*a*).

Sir Samuel Romilly, and Mr. Montagu, referred to *Ex parte Beran* (*b*), and *Ex parte Liddel* (*c*) as having materially shaken the former Decisions.

(*a*) *Cooke's B. L.* 251, Ed. 6. (by Mr. Gregg) 266.

(*b*) 10 *Ves.* 107.

(*c*) MSS. by Mr. Rose.

The

1813.

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ADAM,
Ex parte.
April 27.

The Lord CHANCELLOR.

These Bills were drawn by the House of the Five upon the House of the Two; which were separate Houses; and the Petition prays, that the Holders may prove against both Estates. Upon the Note, handed up to me, it is clear, that what I meant in *Ex parte Liddel* cannot militate against the Principle, which I think must govern this Case. From that Note, I observe, I stated, that, if one House consisted of Two Partners, and another of Three, including those Two, and the Two drew on the Three, there should be Proof against both Firms: if Three gave their joint and several Security, there might be Proof against all: but the Creditor, electing to avail himself of that Proof, could not also go against the separate Estates. The Principle, as there laid down, I take to be according to the clear Law. The Case was singular in its Circumstances; and the only Doubt I had was, whether I applied the Principle properly.

The Petition in that Case represented, that in 1808 *Deprado* was in Partnership with *Groves* and *Hitchcock*, as White Lead Manufacturers: *Groves* and *Hitchcock* residing at *Hull*, and *Deprado* in *London*. In 1809 a Commission of Bankruptcy issued against *Deprado*: in March in the same Year a Commission issued against *Hitchcock*. In February, 1810, a Petition was presented in the latter Bankruptcy; and, *Deprado* and *Hitchcock* being Partners with *Groves*, (who, being a Minor, could not be a Bankrupt (a),) in the Concern, in which the Bill was given, the usual Order was made for keeping separate Accounts, and for a Distribution of the joint Estate to the joint Debts, and of the separate to the separate Debts; and the Holder of that Bill, who had undertaken to receive an Ac-

An Infant
cannot be a
Bankrupt.

(a) *Ex parte Barrow*, 3 Vols. 554.

ceptance

ception in Payment, had gone in under that Commission against *Hitchcock*, as a joint Creditor, to take Advantage of the Order, made under the separate Commission, for keeping distinct Accounts, &c.; not insisting upon a joint Demand by force of the Contract, but by the Law, as against a sleeping Partner, he had proved as a joint Creditor; and received a Dividend from the joint Effects of *Hitchcock*. Afterwards an Application was made under the other Commission, insisting, that Property in the Hands of the Assignees of *Deprado* was joint; and seeking a Distribution of that Property in the same Way among the joint Creditors of the Three. That was determined to be joint Property; and, being so, a farther Distribution of it was made among the joint Creditors.

1813.
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ADAM,  
*Ex parte.*

The Holder of that Paper therefore, being a Creditor under the Contract the Law raised against visible and dormant Partners, received, first, a Dividend out of the joint Estate under *Hitchcock's* Bankruptcy, and a farther Dividend out of the joint Estate under the Commission against *Deprado*; and insisted farther, that he was entitled to prove against the separate Estate of *Deprado*; not having so insisted against the separate Estate of *Hitchcock*. The Commissioners determined that he was not entitled to be considered a joint Creditor, but he was a separate Creditor under both Commissions. The Assignees of *Deprado*, dissatisfied with that Decision, petitioned, that the Proof should be expunged as against his separate Estate; and upon the Affidavits the Struggle was, that he should be considered as a joint Creditor; not as the separate Creditor of *Deprado*. My Opinion was, that he had made his Election, if it was a Case of Election, by proving against the joint Estate under *Hitchcock's* Commission, and also under the other Commission; that he was entitled to be restored to the joint Proof under *Deprado's* Bankruptcy, but was not to be considered a separate Creditor.

The

## CASES IN CHANCERY.

1813.

ADAM,  
*Ex parte.*

The only Question, that can be made upon that Case, is, whether I correctly applied the Principle, which I now think ought to govern this Case. Here being an express Bargain for double Security, the Parties are, I think, entitled to it; the Houses being distinct; therefore this is not within the Rule of Election, where Five jointly and severally contracted, but not as Persons engaged in different Houses and Trades.

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The Order was made according to the Prayer of the Petition.

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1813,  
April 5.

Under the Act of Parliament, giving Jurisdiction upon Petition in Charity Cases, the Trustees, not appearing, ordered to shew Cause, why the Order prayed should not be made.

SEAGEARS, *Ex parte*:—In the Matter of the MANIA CHARITY.

UNDER the late Act of Parliament (*a*), giving Jurisdiction to the Court to proceed in Charity Matters by way of Petition, this Petition was presented; charging the Trustees of the Charity Estate with Breaches of Trust; and praying their Removal; and that the Master might approve of a Scheme for the future Regulation of the Charity. The Trustees were not served; and did not appear.

Sir Samuel Romilly, and Mr. Newland, for the Petitioner.

The Lord Chancellor expressed some Doubt, whether he had Authority under the Act of Parliament to pronounce any Order; the Trustees not appearing: but

(*a*) 52 G. 3. c. 101.

spm

upon the Suggestion of the Counsel, an Order was made, that the Trustees do on the next Day of Petitions shew Cause, why the Court should not make an Order according to the Prayer of the Petition, or such other Order as to the Court shall seem meet.

1813.  
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SEAGEARS,  
*Ex parte.*

## JOSEPH v. DOUBLEDAY.

1813.

THE Bill prayed a Discovery, and an Injunction to restrain the Defendants, the Assignees under a Commission of Bankruptcy against some Partners, and the Partners remaining solvent, from proceeding at Law as the Holders of a Promisory Note, upon which they had obtained a Verdict. The solvent Partners had put in their Answer; upon which they obtained the Order *Nisi* to dissolve the Injunction generally, which had issued for want of an Answer; although the other Defendants the Assignees had not put in their Answer.

Injunction against a Verdict in a joint Action dissolved as against those Defendants, who had answered: not as against all pending Exceptions to the Answers of the rest.

Mr. Newland, for the Defendants, after Trinity Term, 1810, moved to make that Order absolute.

Mr. Agar, for the Plaintiff, objected, that the other Defendants, the Assignees of the Bankrupts, had not put in their Answer.

The Lord CHANCELLOR said, that certainly Cases might exist, where such a Circumstance would not be a sufficient Ground against dissolving the Injunction; but that Question was not decided; as Exceptions for Cause were shewn.

1813.

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JOSEPH  
v.

DOUBLEDAY.

The solvent Partners afterwards put in a farther Answer; and the Assignees also put in their Answer; to which Exceptions were taken. The solvent Partners afterwards obtained an Order *Nisi* to dissolve the Injunction only as against them; and on their Motion to make that Order absolute Mr. Agar shewed Cause on the Merits; but the *Lord Chancellor* dissolved the Injunction absolutely against the Defendants the solvent Partners. Afterwards they obtained an Order *Nisi* for dissolving the Injunction against all the Defendants; though the Assignees had not put in their farther Answer to the Exceptions. The Motion to make that Order absolute was resisted on Two Grounds: first, that such a Motion could not be made by the solvent Partners; secondly, the Exceptions, taken to the Answer of the Assignees were shewn as Cause against dissolving the Injunction.

Mr. Newland, in support of the Motion, contended, that, if the Defendants the solvent Partners were not allowed to make this Motion, the Injunction would never be got rid of; as the Assignees were not disposed to put in a farther Answer; and the Plaintiff was not desirous, that they should; and that the solvent Defendants, if they took out Execution, would be guilty of Breach of the Injunction; as the Judgment was joint, and Execution must be in the joint Names of all the Defendants. Upon the second Ground, he said, that no material Discovery could be expected from the Assignees; who by their Answer expressly denied all Knowledge of the Matters, insisted upon as Ground for the Injunction.

The *Lord Chancellor* declared his Opinion, that it was competent for the Defendants, the solvent Partners, to make this Motion: but that the Injunction could not be dissolved pending the Exceptions to the Answer of the Assignees (*a*).

(*a*) *Ex Relatione*, Mr. Newland.

FINDLAY

## FINDLAY v. WOOD.

1813,

March 15. 29.

**T**HE Defendant moved to dismiss the Bill with Costs for want of Prosecution: the Plaintiff not having proceeded pursuant to an Order, dated the 4th of December, 1812; when he entered into the usual Undertaking upon a second Motion to dismiss.

Mr. Bell, for the Plaintiff, contended, that the Motion was premature: the Plaintiff being entitled to the whole Term and the Vacation to proceed: *Mangleman v. Prosser* (a).

Mr. Wear, for the Defendant, admitting the Practice in Lord Thurlow's Time to have been, as represented, said, the modern Practice authorised the Motion immediately upon the Expiration of the Term; referring to the Practice, as stated in the Note to *Bligh v. ——* (b).

The MASTER of the ROLLS, sitting for the Lord Chancellor, having refused the Motion, as premature, it was renewed before his Lordship.

*The Lord CHANCELLOR.*

The Question is, what is meant by the Expression "another Term." I have always understood, that the Term draws the Vacation along with it; and, if the ancient Practice was, as it is admitted to have been, I certainly cannot recollect, when, if ever, it was altered.

No Order was made.

(a) 3 Bro. C. C. 191.

(b) 13 Ves. 455.

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RUSSELL

1813,  
May 3.

On Abate-  
ment by Bank-  
ruptcy of a  
Defendant, an  
Executor, after  
a Decree for  
an Account,  
supplemental  
Bill in Nature  
of Bill of Re-  
vivor neces-  
sary.

### RUSSELL v. SHARP.

AFTER the usual Decree for an Account against Executors, one of them, the Defendant, *George Sharp*, became a Bankrupt. The Assignees by Petition prayed, that they may be at liberty to go before the Master upon taking the Accounts; and may be admitted on behalf of the Bankrupt's Creditors to support his Discharge.

*Mr. Wingfield*, in support of the Petition.

The Register declined drawing up the Order; objecting, that, the Suit being abated by the Bankruptcy, the Plaintiffs could not proceed in the Accounts, until they had filed a supplemental Bill in the Nature of a Bill of Revivor.

*The Lord Chancellor* refused to make the Order.

1813,  
May 6, 7.

Though ge-  
nerally a Pur-  
chaser cannot  
be called on  
for his Money,  
until he has a Title, yet, where he is let into Possession upon a mu-  
tual Confidence of a speedy Title, and the Difficulty is a mutual Sur-  
prise, he cannot, without express Contract, retain the Possession, with-  
holding the Money.

### GIBSON v. CLARKE.

THE Bill prayed the specific Performance of a Con-  
tract for the Sale of an Estate. The Purchaser,  
having taken Possession, and paid Part of the Purchase-  
money, took Objections to the Title, and also that the

Quantity

Quantity of Land did not correspond with the Representation in the Particular. Under these Circumstances the Vendor moved, that the Residue of the Purchase-money should be paid into Court.

1813  
GIBSON  
v.  
CLARKE.

Mr. Leach, and Mr. Abercromby, in support of the Motion. Sir Samuel Romilly, Mr. Hart, and Mr. Courtenay, for the Purchaser, opposed it.

*The Lord Chancellor.*

This is a Motion of very great Importance, as a general Precedent: I shall therefore state the general Observations, which will regulate my Judgment. I have frequently acted upon the Principle, that, where under a Contract for the Purchase of an Estate Possession has been taken, and the Estate is therefore taken out of the Hands of the Owner, the Court should have a great Anxiety to take the Money from the Purchaser: but cannot go that Length, where under the Agreement it seethis, the Vendor has thought proper to put the Purchaser in Possession with an Understanding between them, that he shall not pay his Money, until he has a Title. If the Vendor has been so foolish, he must abide by his Contract: but, where both Parties are acting under the Confidence of a speedy Title, which Confidence is not made good, and that is a Surprise upon both, though it would be too much to call upon the Person, taking Possession of the Land, to pay the Money, before he has his Title, yet in that Case of mutual Surprise there can be no Justice in permitting him to keep Possession of the Land. This therefore may prove a middle Case: though it may not be just to call upon the Purchaser at this Moment to pay his Money, he may be properly required to restore the Land. He must do the one or the other, unless the Vendor intended to trust him, and that was their Contract, with the Possession of the Land, until the Vendor by making a

1813. Conveyance of the Estate made out his Title to the Money.

GIBSON

v.

CLARKE.

This is my general View of these Cases. I think it right; and from the frequent Instances of Men buying Estates, not meaning to pay for them, until they sell again, it is necessary to apply that Principle; and to take care in these Cases, that Property shall not change Hands on one Side, until it does so on the other.

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*The Lord CHANCELLOR.*

May 7.

In this Case the Possession appears to have been given and taken under a mutual Apprehension, that the Title could be immediately made good. If that proves to be Misapprehension, and the Purchaser insists on holding Possession under such Circumstances, he ought at least to pay Interest for the Purchase-money.

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The Purchaser then agreed to restore the Possession; accounting for the Rents; without Prejudice to any Question between the Parties, in case a specific Performance of the Contract should be decreed.

SCOTT

1813,  
March 27.  
May 8.

## SCOTT v. MACKINTOSH.

THE Defendant, carrying on Business as a Provision Merchant and Provision Broker, having in 1806 agreed to sell his Business of a Provision Broker to the Plaintiffs, by a Deed, dated the 20th of December, 1806, sold and assigned to the Plaintiffs his Business as a Broker in the Purchase and Sale of Foreign Butters (except Irish), Hams and Cheese in the City of London, from the 31st of December, 1806; covenanting, that he would not use or exercise the Trade of a Broker in the Purchase or Sale of Foreign Butters, &c. (in the Terms before stated); reserving the Right of acting or trading as a Merchant either in the Articles before stated or any other.

Bill for an Account under Covenant upon Sale of Good-will not to carry on the Trade.

The Bill, alleging, that the Defendant had notwithstanding his Engagement continued to act as a Broker for other Persons, who paid him the usual Commission of Course a Bill 1 per Cent, and also in the Disposal and Sale of the Goods, imported by himself as Merchant, contrary to the Usage of Merchants in the City of London, prayed an Account of all the Cargoes of Provisions, imported by him since the 1st of January, 1807, and of the Commission received by him; that the Plaintiffs might be declared entitled to a Commission of 1 per Cent. upon the Produce of all such Goods; an Account against the Defendant as Broker: and an Injunction, restraining him from acting as Broker, and proceeding at Law for the Instalments, remaining due on the Purchase.

An Exception was taken to the Answer, as insufficient in not setting forth an Account of the Cargoes of Provisions, imported by the Defendant, and of all Sums re-

## CASES IN CHANCERY.

1813.

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SCOTT  
T.

MACKINTOSH.

ceived by him, produced by the Sale of such Cargoes, and the Names of the Purchasers. The Master having allowed the Exception, the Defendant excepted to his Report; which Exception the *Master of the Rolls*, sitting for the *Lord Chancellor*, allowed.

A Motion was made to revive the Injunction, to restrain the Defendant from proceeding at Law, until the Exception, taken to the Master's Report, should be re-heard.

Mr. Hart, in support of the Motion; Mr. Leach, and Mr. Wingfield, for the Defendant.

It was said, that the Master's Judgment against the Answer proceeded on the Ground, that the Defendant, submitting to answer, was bound to answer fully (a): but in Reply it was insisted, that this Rule binds the Defendant to answer only as to what is material to the Relief.

*The Lord Chancellor.*

This Motion proposes to revive an Injunction, upon Matter already in the Answer, which Answer the Court now thinks sufficient, but which the Master originally thought insufficient; and farther, to revive the Injunction upon the Ground, that, the Judgment of the *Master of the Rolls*, that the Answer is sufficient, being under Appeal, the final Judgment of the Court may be with the Master, that the Answer is insufficient, against the Opinion of the *Master of the Rolls*; and therefore the Injunction ought to be revived. I never will revive an Injunction upon that Ground. A more mischievous Practice could not be introduced than, where the Judgment of the Court is, that the Answer is sufficient, upholding an Injunction upon the Supposition, that the Judgment may be reversed.

(a) *Rowe v. Teed*, 15 Ves. 1 *Ball and Beattie*, 323.372. *Leonard v. Leonard*,

The old Rule was, that the Master's Report should be procured in Four Days; and if in his Opinion the Answer was sufficient, the Injunction was gone. The Master's Opinion against this Answer was over-ruled by the *Master of the Rolls*; and if the Court should lay down the Rule, that in every Instance of an Attempt by Re-hearing or Appeal, as the Judgment may be reversed, for that Reason the Injunction shall revive, it would be quite endless; and Injunction would prove a most ruinous dilatory Proceeding. Therefore I shall certainly not interfere on that Ground.

1813.

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SCOTT

v.

MACKINTOSH.

With regard to the Merits, the Defendant sold to the Plaintiff the Good-will of his Business as a Broker, and the Profits specifically of all the Brokerage he should make. Where a Man sells the Good-will of a Trade, and covenants to make it as profitable as he can, the actual Profit made is not that, which the Vendee is bound to take: but he will have an Action of Covenant, if he can establish his Title to more through the Default of the Vendor. There can be no Custom, binding a Man not to sell his own Provisions. With regard to the Consignments there is more Doubt; but not much upon that, if he was not distinctly acting as a Broker. The only Point, on which the Plaintiff can stand, is the Allegation, that the Defendant has dealt as a Broker; and to what Extent is not mentioned. The Result of what has passed at Law is, that £750 was paid into Court by the Defendant in the Action brought by the Plaintiff; who, having taken out that Sum, was afterwards nonsuited. He has therefore had the good Fortune to obtain £750 in an Action, in which he is nonsuited; which Sum must be set off against the Sum, about £1200, remaining due on the Purchase. Am I then to revive the Injunction upon the Possibility, that he will be entitled to something more? If this Answer is sufficient, whose Fault is it, that he cannot be told, what Sum *ultra* he is entitled to? He does not call upon the Defendant

## CASES IN CHANCERY.

1813.  
~~  
SCOTT  
v.  
MACKINTOSH.

Defendant to state, what would be the Result of the Account; but wishes to protect himself from paying the Balance of his Purchase on the Ground, that he may be able to shew some small Sum due beyond the £750; and that in a Case, where Insolvency is not suggested.

My Opinion therefore is, that this Injunction should not be revived. I do not recollect an Instance of a Bill for an Account upon a Covenant not to carry on a particular Trade. The usual Course is a Bill of Discovery for the Purpose of an Action.

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1813,  
May 11.

BRYANT, *Ex parte.*

*Ante*, 211.  
Though a  
Bankrupt  
would be re-  
strained from  
repeated At-  
tempts to su-  
persede the  
Commission,  
amounting to  
Vexation, he  
was not pre-  
vented from  
bringing a  
second Action:  
but pending  
that Action and

THIS Petition (a) stood for Judgment.

*The Lord CHANCELLOR.*

There is no Instance of this Court enjoining a Bankrupt from trying his Bankruptcy more than once, or in other Words of quieting the Assignees and other Persons, entitled under the Commission, until his Attempts to supersede it become so vexatious from their frequency, that it is fit by the Power of the Court to put an End to such Proceedings. The Consequence is, that the Assignee under this Commission is placed in a Situation of great Difficulty; as he will be personally answerable for every Shilling of the Property, which he shall distribute under

(a) *Ante*, 211.

an Inquiry, directed relative to an Estate, by the Sale of which he proposed to pay his Debts, the Commission was ordered to proceed in the usual Course.

the

the Commission, if the Petitioner should finally succeed in overturning it.

1813.

BRYANT,  
*Ex parte.*

Under those Circumstances, the Petitioner offering an Estate, to which he represented himself as having a good Title, and sufficient in Value for the Satisfaction of his Creditors, and undertaking to join in a Sale for that Purpose; it appeared to me to be the best Course for the Creditors to direct an Inquiry, which I hoped would terminate, before the Trial of the second Action, brought by the Bankrupt, with the View of bringing into Court a Fund, that would pay the Creditors: but I did not mean by that to create Delay; and, not meaning to blame the Petitioner for making a Record, that will probably take the Case to the House of Lords, if it runs, perhaps not improperly, to great Length, I cannot prevent the regular Proceedings under this Bankruptcy. Therefore, not removing this Assignee, or doing any thing farther, I shall make this Order, that the Commissioners shall proceed in the Bankruptcy, as they do in ordinary Cases.

## TASBURGH'S CASE.

1813,  
May 3.

BY the Return to a Commission to examine *Mary Augusta Rosalia*, the Wife of *Michael Tasburgh*, under rate Examination Order, dated the 26th of February, 1813, the Commissioners certified, that she did attend them; and was examined solely and apart from her Husband at his Dwelling-house by virtue of the said Order.

The

Form of separation of a married Woman, taken by Commission.

## CASES IN CHANCERY.

1813  
—  
TASBURGH'S  
Case.

The Examination of Mrs. *Tasburgh* states, that she is willing and desirous, that the several Sums in the Order mentioned shall be paid, and the Securities transferred, to the Trustees to be named in the Settlement, to be executed pursuant to Articles, previous to her Marriage, upon the Trusts of that Settlement; and that the Sum of £1000 may be paid, or the Securities transferred, to the said *Michael Tasburgh* for his own Use.

The Signatures of Mrs. *Tasburgh* and of the Commissioners were proved by Affidavit.

Mr. *Spence*, in support of the Petition, presented under this Certificate.

*The Lord Chancellor.*

This Petition relates to a Subject of considerable Importance: the Return to a Commission for the Examination of a married Woman. The Return in this Instance, though conformable to some late, very loose, Proceedings, is by no Means agreeable to the Practice, and the antient settled Form. These private Examinations of Ladies in the Country, are, I fear, more frequently Examinations by the Husband than by the Commissioners; and upon a Subject of so much Consequence I do not choose to depart from the Form, which was most carefully settled with the View to give as much Protection as the Circumstances would enable the Court to give. In future therefore I shall expect, that the Returns to these Commissions shall be made according to the antient and proper Form.

..... introduced by Mr. *Croft*, the  
..... Esq; ....., and the Lord Chancellor.

Under

Under a Commission to take the Examination of *Dorothy, the Wife of John George Wessback*, the Commissioners certified, that pursuant to an Order, dated the 30th of July, 1783, they attended the said *Dorothy Wessback*; and, after having separately and apart from her Husband read to her the Deed, dated the 12th of *April*, &c. in the Decree mentioned, and explained to her the Purport and Effect thereof, they did examine her separately and apart from her said Husband, whether she had freely and voluntarily executed the said Deed; and whether she was consenting, that the same should be carried into Execution; and on such Examination she did declare, that she had executed the said Deed freely and voluntarily; and was consenting and desirous, that the same should be carried into Execution; and that they took down such her Examination or Declaration in Writing; and that she thereupon signed the same; as the same now appears above.

1813.  
—  
TASBURGH's  
Case.

By the Examination, referred to in that Certificate, signed by *Dorothy Wessback*, she declared, that she freely and voluntarily executed the Deed; and is well acquainted with the Purport and Effect thereof; and desires, that the same may be carried into Execution.

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Under another Commission the Commissioners certified, that pursuant to an Order in the Cause, dated the 21st of *February*, 1786, they had been attended by the Plaintiffs *Hannah*, the Wife of *Robert Dockray*, and *Mary*, the Wife of *John Graves*; and had in pursuance of the said Order examined *Hannah Dockray* solely and secretly, separately and apart from the said *Robert Dockray*, her Husband, how and in what Manner and to what Uses she was willing and desirous her Third Part of the Sum of £575: 10s: 5d. Cash, in the Bank, in the said Order mentioned,

1813.

—  
TASBURGH's  
Case.

tioned, should be paid and applied; and they did at the same Time read the said Order to her, and explain to her the Purport and Effect thereof; and do certify, that the said Plaintiff *Hannah Dockray* did on such her Examination say and declare, she was willing and desirous, that the Sum of £191: 16s: 10d., being her Third Part of the said Sum, might and should be paid to the said Plaintiff *Robert Dockray* to and for his own Use and Benefit; and she did thereby freely and voluntarily consent, that the same be paid to him accordingly.

*Hannah Dockray* by her Examination in Writing, and signed by her, states, that she being solely and secretly examined by the said Commissioners, separate and apart from her Husband, how and in what Manner and to what Uses she is willing and desirous, that her Third Part, &c. should be paid and applied, does say and declare, that she is willing and desirous, that the Sum of £191: 16s: 10d., &c. may and shall be paid to the said *Robert Dockray*, her Husband, to and for his own Use and Benefit; and she does truly, freely, and voluntarily, Consent, that the same may be paid to him accordingly.

As to the Share of *Mary Graves* the Certificate and Examination were expressed in the same Terms; and the respective Signatures of the Parties and the Commissioners were verified by Affidavit.

HOWE

HOWE v. DUPPA.

1813,  
May 12.

THE Bill was filed by the Executor of *Baldwin Dappa*, for the Purpose of setting aside an Agreement, dated the 22d of October, 1791, and Conveyances in pursuance of it in 1792 and 1793, of all the Estate and Interest of *Baldwin Dappa* to the Defendant, his Son: alledging Fraud, Inadequacy of Consideration, Concealment of Value, &c.; stating the Title under the Will of *Baldwin Dappa*, the elder, devising to *Richard Dappa* for Life, with Remainder to his first and other Sons in Tail, and in Default of such Issue, to his Brother *Baldwin Dappa* for Life, and to his first and other Sons in Tail. In 1789 *Richard Dappa* died without Issue.

Plea with an Exception, not requiring a Reference to the Answer, allowed.

To a Bill to set aside a Conveyance for Fraud, &c.

Plea of Title paramount under a former Conveyance of all the Estate and Interest, under which

The Defendant by a Plea to the Relief and Discovery, except as to such Estates as were purchased in the Name of *Richard Dappa*, and conveyed to the Uses of the Will, the Plaintiff set up a Purchase for valuable Consideration by Indentures, dated the 2d of August, 1780, from *Baldwin Dappa* by *Richard Dappa* of all *Baldwin's* contingent and other Interest under the Will, subject to an Annuity of £400 in Trust for him.

Sir Samuel Romilly, and Mr. Owen, for the Plea.

Whatever may be alledged in respect of the Agreement of 1791, and the Deeds, made in pursuance of it, the Plaintiff can have no Relief, whilst the Purchase of 1780 is unimpeached; that Deed devesting all the Right and Interest of *Baldwin Dappa*. The subsequent Instruments are therefore merely voluntary on the Part of the Defendant. This is in Substance a Plea, that the Plaintiff has

no

## CASES IN CHANCERY.

1813. no Title; which, though a negative Plea, is unquestionably good (*a*).  
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 Howe
 v.

DUPPA. Mr. Richards, Mr. Hart, and Mr. Cooke, for the Plaintiff.

This Plea is framed to meet a different Title from that stated by the Bill. Touching neither the Agreement of 1791, nor the subsequent Deeds, and completely overlooking the Subject of the Suit, the Plea relies on the Deed of 1780 alone. The Presumption is, that in the subsequent Period the Deed of 1780 was released; and the Defendant, dealing with *Baldwin Duppa* as Tenant for Life in Possession, is estopped from saying, that he was dealing for nothing. That Transaction is utterly inconsistent with the Allegation that *Baldwin Duppa* had then no Interest to dispose of. The Execution of the Deed of 1780, whatever may be its Effect, cannot prevent the Equity to have the Deeds, impeached for Fraud rescinded, or removed, as Clouds upon the Title.

Another Objection to this Plea is, that it is not clear. A Plea must unequivocally point to that, to which it applies, not by Exception. Thus a Plea to such Parts of the Bill as are not answered is bad (*b*). How can the Court know, what this Plea covers, without looking into the Answer; which must be resorted to for the Purpose of ascertaining the Extent of the Plea? That Objection was taken by Lord Hardwicke in *Salkeld v. Science* (*c*). The Plea is likewise bad, as not being a direct Denial of Plaintiff's Title. There is not a direct Averment, that

(*a*) See Lord Redesd. Tr. Pl. p. 233; and Coop. Tr. Pl. Pl. p. 188, 189; and Cooper's p. 229; and Authorities there Tr. Pl. p. 249; and the Au- cited.
 thorities there cited. (*c*) 2 Ves. 107.

(*b*) See Lord Redesd. Tr.

Baldwin

Baldwin Dupper did not on the Death of his Brother *Richard Dupper*, the preceding Tenant for Life, become Tenant for Life in Possession: but that important Fact is only to be collected by Inference.

1813.
Howe
v.
DUPPA.

Sir Samuel Romilly, in Reply.

This Plea is confined to the Estates, alledged to be the Property of the Testator at the Time of his Death; and contends, that the Plaintiff is not entitled to Relief: a Plea, of which one Species is, that the Plaintiff is not Heir at Law (*a*). Admitting these Deeds to be fraudulent, it sets up a Title paramount the Plaintiff's; alledging in Substance, that the Defendant was deceived by *Baldwin Dupper* in purchasing what did not belong to him, having previously sold these very Estates to *Richard Dupper*. The *Dictum* of Lord Hardwicke (*b*) is inapplicable to this Case; and means, not that a Plea with an Exception is bad, but a Plea with an Exception, generally, of what is not answered (*c*). If the Exception, as in this Instance, is clearly pointed, there is no Objection to it: otherwise a Plea, which covered every thing " Except Whiteacre" would be bad. Had this Plea proceeded to negative the Execution of any Deed intervening between 1780 and 1796, which, it is suggested, may be presumed, the Plea would have been open to Objection, as multifarious.

The VICE-CHANCELLOR.

1813,
May 12.

Two Objections are made to this Plea: one of Form: the other of Substance. The Objection of Form is, that the Plea contains an Exception, which cannot be distinctly

(*a*) See *Cooper Tr. Pl.* p. 70. *Mosely*, 249, 250; and *Lord Redesd.* 40. *Tr. Pl.* 223, and Authorities cited. (*c*) *Wetherhead v. Blackburn*, post.

(*b*) *Salkeld v. Science*, 2
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understood

1813:

Howe
v.
DUPPA

Plea, with
Exception of
Matters after
mentioned,
bad.

understood without having reference to the Answer; whence the Court must collect the Meaning and Extent of that Exception; and in support of that Exception the Passage in *Vesey* was referred to; where Lord Hardwicke states, that all Pleas in this Court, containing Exception of Matters hereinafter mentioned, are bad; as it is impossible for the Court to judge, what the Plea covers without looking into the Answer; which may be sufficient, or not; and the Court must judge of the Sufficiency of the Answer, before they can judge of the Validity of the Plea.

In that Passage I understand Lord Hardwicke to be speaking of the Phraseology of the Plea; which, if defective on the Face of it, containing a Reference to some other Part of the Record, is not perfect, substantial, or intelligible, in itself: and the Court cannot form a Judgment upon it without referring to some other Part of the Record. That Objection does not apply to this Plea; which only excludes all that Property, that might have been procured by laying out Part of the personal Estate in the Purchase of Land subsequently to the Deed of 1780; in which Case that Deed would not cover that Property. In this respect the Plea requires no Reference to any other Part of the Record to make it intelligible. It is perfectly intelligible of itself; covering all the Property, that passed by the Deed of 1780, but not covering Property acquired after that Date. The Exception therefore does not make this Plea invalid and unintelligible on the Face of it; requiring a Reference to anything else to make good that, which upon the Face of it is defective.

With regard to the Substance of this Plea, *Baldwin Dappa*, having under the Will only a contingent Interest, depending on the Death of *Richard Dappa* without Children, came to an Agreement, in consideration of a Debt, contracted by Money advanced for the Education of his Children

Children by *Richard Dupper*, then in Possession as Tenant for Life under the Will, to relinquish absolutely all the real and personal Property, to which he *Baldwin* might ever be entitled under that Will. This Agreement, which led to the Deed of August, 1780, was a very natural Transaction in the Family; standing upon valuable Consideration; and, if it remained unimpeached from that Time, the Consequence is, that from the Execution of that Deed *Baldwin Dupper* ceased to have any Kind of Interest in any Part of the Property; at least in all, that was purchased previously to 1780; unless there was afterwards a Reconveyance. The Property was absolutely parted with; and the only Interest remaining in him was the Annuity of £400 under the first Trust of this Deed. It does not appear, that this Deed was ever questioned, though he lived Fifteen Years, surviving his elder Brother Six Years, except as it may be collected from what passed in 1791. By Deeds, executed in that Year, it appears, that *Baldwin Dupper*, affecting some Sort of Controul over the Estate, again parted with his Interest; making certain Provisions for his Family, but upon a Consideration very inadequate, if he was then really in Possession of all the real Estate; the annual Value of which exceeded £1000: but the decisive Answer to this Bill is, that the Fact was mistaken: at the Date of those Deeds he had no Interest whatsoever in the Property; having Eleven Years before by the former Deed parted with all his Interest: a Fact, which remaining unimpeached destroys the whole Foundation of this Bill; which proceeds upon a supposed Interest in him in 1791. He may controvert the Existence or Validity of that Deed of 1780: it is a possible Case, that he may have again acquired the Estate before 1791; but there is nothing in these Pleadings shewing that. As it now stands, he had parted with all his Interest; and I cannot presume, that he ever regained it. That affords a compleat Answer to his

1813.
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Howe
v.
DUPPA.

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1813. Prayer of Discovery and Relief. There is therefore no
 ~~~~~ Objection to this Plea either in Substance or Form.

Howe  
v.  
DUPPA.

The Plea was allowed.

1813,  
May 13.

v. SKELTON.

Reference before Decree  
confined to the Case of Title.  
Where there was a farther Subject of Dispute, under a Claim of Compensation, it was refused with Costs.

UNDER a Bill for the specific Performance of a Contract for the Sale of an Estate a Motion for a Reference to the Master before Decree was resisted on the Ground, that the Title was not the only Subject in Dispute: the Purchaser claiming an Abatement of the Price on account of Misrepresentation (a).

Mr. Leach, in support of the Motion.

The Question as to the Purchaser's Right to Compensation is consistent with the Object to have the Title made out and the Contract performed. The same Principle of Convenience therefore, which is the Foundation of this Rule of Practice, where nothing is in Dispute except the Title, justifies the Reference, where there is no other Objection to perform the Contract except the Claim of Compensation.

Sir Samuel Romilly, against the Motion.

(a) *Eldridge v. Porter*, 14 Ves. 139, and the References

This

This Practice is modern, within the last Thirty Years: first established by Lord Thurlow; where nothing but the Title was in Dispute; and that has been since followed; the Court professing to go no farther. The Principle must be to save Expence, and bring the Cause to a more speedy Conclusion: but the Effect in this Instance will be the Reverse; as there must be Two Reports.

1813.

v.

SKELTON.

Mr. Leach, in Reply, said, the Principle is to prevent unnecessary Delay by procuring a Report upon the Title now instead of Six Months hence; and, admitting, that the Claim to an Allowance may require another Report, it will be a very short one.

#### *The Vice-Chancellor.*

The Propriety of this Application stands entirely upon the Practice. Where the single Point of Title is in Dispute, and there is no possible Reason for going through with the Cause, it has been found convenient to take this short Course even without Consent: but the same Reason does not apply to a Case of a mixed Nature; which cannot be entirely determined by the Order of Reference; but must be brought to a Hearing; and, if the Effect may be some saving of Time, the Expence may be increased by Two distinct Orders and Reports in One Event at least. It is however not to be argued on Principle; but rests entirely on Practice; and I will not carry it farther without a Precedent (*a*).

The Motion was refused with Costs.

(*a*) *Blyth v. Elmhirst, ante, 1.*

1813,  
May 15, 18.

SMITH, *Ex parte.*

General Assignment of all Effects an Act of Bankruptcy; giving therefore no Lien: but a Lien under a previous Deposit and Execution was not affected.

Discretion of the Great Seal to order Proof in Bankruptcy upon a Valuation, instead of a Sale of Securities regulated by Circumstances; and not too readily exercised.

Property in the Possession and Disposal of a Bankrupt passes to the general Creditors by Stat.

21 Jam. 1. c.  
19, s. 11,  
against his Assignment.

**I**N May, 1812, John Willock issued a Writ of *Fieri Facias* against William Hervey for a Debt of £550; and took his Goods in Execution. At a Meeting of his Creditors the Petitioners, who were Creditors for £708: 6s: 2d. proposed to pay 10s. in the Pound upon his Debts; by paying 5s. more; and that they would pay off the full Amount due to Willock in Discharge of his Execution, and the full Amount of the Rent; taking an Assignment to themselves of his Effects for their own Benefit. This Offer being accepted, a Memorandum was signed accordingly; and Hervey signed a Memorandum, by which in consideration of the Debt due to the Petitioners, and of their having agreed to pay such Sums to the Creditors, he agreed to assign over to them for their own Use and Benefit all his Leases, Plate, Stock, and other Estate and Effects, and all Debts due to him: but he was to remain in Possession; and to collect his Debts. In pursuance of this Agreement the Petitioners gave their Bills to the Creditors: paid £560: 1s. to the Sheriff in Discharge of Willock's Execution; and paid the Rent; and they received from Willock Two Leases, deposited with him by Hervey, as a Security, and a large Box of Plate, also deposited by him. By Indenture, dated the 4th of June, 1812, but executed on the 17th of August, Hervey assigned to the Petitioners for their own Use all the Furniture, Fixtures, Wines, Stock, Property, and other Effects, contained in Two Valuations, amounting to £1100 and £580, being the Property and Wines in his House and Cellar; agreeing to assign a Lease; which had been mislaid; declaring that Assignment to be in full Satisfaction of the Petitioners' original Debt, of the Money paid by them, or which they were liable to pay, to the Creditors, and of

all

all Money due from *Hervey* to them on the 1st of June instant. The Petitioners Debt having increased to £4021: 4s: 5d. on the 26th of April, 1813, a Commission of Bankrupt was taken out against *Hervey*, on the Petition of *William Ewart*; who had received the Composition.

1813.  
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SMITH,  
*Ex parte.*

The Petitioners, having had the Two Leases appraised at £800, the Fixtures at £140, and the Plate at £250, (amounting altogether to £1190); prayed, that the Petitioners may be at Liberty to sell the Leases, the Plate, and the Fixtures; and to retain the Produce of the Sale, in case it shall not exceed £1190, in Part of their Debt; submitting, if there should be any Surplus beyond £1190, to pay it over to the Assignees of the Bankrupt's Estate: that in the mean Time they may prove £2831: 4s: 5d. as the Balance of their Debt, after deducting £1190; and may vote in the Choice of Assignees; with Liberty, in case the specific Property to be sold should not produce £1190, to increase their Proof.

Sir Samuel Romilly, and Mr. Hart, in support of the Petition, said, the Order prayed, though it could not be obtained from the Commissioners, would be made almost of course by the Lord Chancellor.

**Mr. Leach, and Mr. Montague, for the Assignees.**

The Rule in Bankruptcy is, that a Creditor, Holding a Pledge, shall not be permitted to prove, until that Pledge has been sold, or the Value of it otherwise ascertained (*a*). This Order is by no Means of course. It is true, a similar Order was made in the Case of *De Tastet* (*b*), but under very special Circumstances, having no Analogy to

## CASES IN CHANCERY.

1813.  
SMITH,  
*Ex parte.*

these. To sanction such an Order the Security ought on the Face of it to be strictly unimpeachable; but this Assignment, comprising all the Property the Bankrupt had in the World, was an Act of Bankruptcy. This Order will prejudge that important Question, arising on a Deed open to Objection on another Ground, that it is a Security, not for the Instalment or Composition, but for the original Debt.

Sir Samuel Romilly, in Reply, contended, that the Petitioners were clearly entitled to a Sale of the Pledge, held by Willock, whom they had paid; and the Assignment could not affect the previous Deposit.

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1813,  
May 18.

*The Lord Chancellor.*

The general Nature of the Application, made by this Petition, is this. It represents the Petitioners as having a Lien upon Two Leases, some Plate and Fixtures, for their Debt: that is, for their general Debt; and proposes to put a Value upon those Articles; and to consider them as precisely in the same Situation as if sold previously to the second Meeting, and the Residue of their Debt thereby ascertained. The Question, whether they have a Lien for their general Debt, must be examined by a very accurate Attention to the Circumstances; and it is stated, that this Application could not be successfully made to the Commissioners; but can only be granted by the *Lord Chancellor*, acting upon his Discretion under particular Circumstances.

Though some Instances of such Orders have occurred, they are not very common; and upon Principle I think their Number is not to be too readily enlarged. The Ground, on which it has been hitherto held, that a Creditor having a Security, shall not be permitted to prove his Debt, until

until he gives up his Security, or by a previous Sale ascertains his Debt, is, that he cannot know, what he is to prove, until his Debt has been reduced by the Produce of the Security; and therefore in ordinary Cases that Object is obtained by a Sale; and the Court has not gone solely upon the Difficulty of ascertaining the Debt, but has also upon Policy had Regard to this Circumstance; that, when there is a fair Question as to the Validity of the Security, it is obvious, that the Creditor, having a Value put upon it, before it is determined, whether he has a Right to it, or not, places himself in a much better Situation with regard to his Contest with the general Creditors, than he would be in under the general Rule, prescribing a Sale.

1813.  
—  
SMITH,  
*Ex parte.*

For these Reasons I conceive it to be clearly within the Power of the Great Seal, exercising a sound Discretion, to make such an Order; and Instances have occurred, where such an Arrangement was obviously beneficial to the general Creditors, as well as the individual Creditor holding the Security; as in the Case of a Mortgagee of a *West India Estate*, or its Produce, at a Time very unfavorable for disposing of such Property, it would be no less for the Benefit of the general Creditors than of that particular Creditor, to have a Value put upon the Estate, or the Produce in his Hands, and by subsequent Arrangement carry it up to the utmost Advantage. That shews, that the Court ought to have this Discretion. So in *De Tastet's Case* (a) I had no Difficulty. His Claim was indisputable; unless it could be cut down entirely by the Answer, that was given to it; and bearing an inconsiderable Proportion to a most enormous Debt, I thought it reasonable, that he should have some Influence in the Choice of Assignees; controuling that, so as to prevent the Appointment of an Assignee less indifferent between him and

(a) *Ex parte De Tastet, ante, 280.*

## CASES IN CHANCERY.

1813.

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SMITH,
Ex parte.

the other Creditors than he ought to be. In each Case therefore the Court is bound to look with very nice Attention at the particular Circumstances.

Under the Circumstances, that appear upon this Petition, Property came to these Creditors of a greater Value than the Amount of their Debt at the Time of the Assignment. The general Assignment of all *Hervey's* Estate was a clear Act of Bankruptcy; and the Property, being left in his Possession and Disposal, will of course go to the general Creditors (*a*). That Assignment being cut down by the Operation of the Law, the Petitioners contend, that with regard to the Two Leases and the Plate in the Hands of *Willock* they have a Lien; and that Transaction, and the subsequent Circumstances, viz. their treating the Leases in account in respect of their Value as those of the Bankrupt and themselves, as his Creditors, must be considered as undone; originating in an Agreement, that cannot be carried into Effect; and that they have a Right to contend, that they stand, as if this Assignment had not been made. I think, they have that Right: but then, the Assignment being cut down, they cannot apply the Lien to their general Debt; being entitled only to that Lien, which *Willock* had. Abstracting therefore from their general Debt so much as was due to *Willock*, they have a Right to prove the Residue without regard to the Lien: so much as the Lien does not extend to: but with regard to the Residue the Proof must be stayed, until the Value of the Lien has been settled, and they are in a Condition to prove in the ordinary Course.

An Order was pronounced; declaring, that the Petitioners have no Lien except for that Debt, with regard to

(*a*) Stat. 21 Jam. 1. c. 19, s. 11.

which

which they may stand in the Place of *Willock*; and, as to the remaining Part of the Debt, that they should go before the Commissioners, and prove in the ordinary Course.

1813.
~~
SMITH,
Ex parte.

MORRIS v. OWEN.

1813,
May 22.

AMOTION to dismiss the Bill for want of Prosecution was resisted on the Ground, that the Plaintiff had obtained an Order to amend Six Months ago; though it was not served, or even drawn up.

Mr. Bell, for the Defendant: Mr. Sidebottom, for the Plaintiff.

Order to amend the Bill, not served or drawn up, cannot prevent the Motion to dismiss for want of Prosecution.

The Lord Chancellor at first intimated, that the Course was a Motion, that the Plaintiff should draw up his Order, and amend within a Week; or that the Order to amend should be discharged: but, having consulted the Register (*a*), said, that if a Plaintiff, having obtained an Order to amend for the Purpose of keeping his Bill in Court, did not get that Order drawn up and served, until the Defendant had a Right to move to dismiss, the Order under these Circumstances must be considered a Nullity; and cannot prevent the Dismissal of the Bill.

(*a*) Mr. Croft.

CLOWES

1813,
May 14, 17,
21.

Distinction
between the
Admission of
parol Evidence
to support, or
resist, the spe-
cific Perform-
ance of a
Contract for
Land: admis-
sible for the lat-
ter Purpose
upon Mistake
and Surprise as
well as Fraud;
not to vary,
add to, or ex-
plain, the writ-
ten Contract.

Upon the am-
biguous Terms
of a Contract,
as including or
excluding the
Timber, the
Purchaser's Bill
for specific
Performance
dismissed; and
having through-
out insisted
upon his Con-
struction, he
was not per-
mitted to com-
pel the Vendor to convey upon the Terms he originally offered.

CLOWES v. HIGGINSON.

AFTER the Decree, pronounced at the *Bols* in the Cause of *Higginson v. Clowes* (a), dismissing the Bill, this Suit was instituted by the Purchaser, the Defendant in that Cause; praying a specific Performance of the Contract, according to his Construction; that is, including the Timber, except upon the Lots Four and Five; to which, as he represented, the separate Valuation was to be confined: the Defendants, the Vendors, insisting, that under the eighth Condition of Sale all the Timber was to be separately valued.

Mr. Hart, and Mr. Bell, for the Plaintiff, opposed the Introduction of parol Evidence; insisting, upon the Authorities, cited in the former Cause between those Parties, that it cannot be admitted to vary, add to, or explain, a written Contract; as it may to shew Fraud or Surprise.

Sir Samuel Romilly, and Mr. Heald, for the Defendant.

Evidence may clearly be admitted in support of the Defence to a Suit in a Court of Equity for the specific Performance of a Contract against the plain Intention; where it can be clearly established, that the one did not understand, that he was selling what the other conceived that he was buying. In such a Case, existing *bona fide*, and established by clear Evidence, the Court would refuse to execute the Agreement; leaving the Party to Law.

(a) 15 Ves. 516.

The

The Object of this Evidence is to explain an Ambiguity on the Face of the Conditions of Sale; and its Nature is, that the Auctioneer before the Sale stated to the Company in the Presence of Persons, bidding for the Plaintiff, that the Timber on the different Lots was to be paid for at a Valuation; that several Persons would have bid considerably more, if they had not by that Explanation been led to conclude, that they should have a farther Sum to pay for the Timber.

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The Case of *Gunnis v. Erhart* (a), respecting Evidence of Declarations by the Auctioneer against the printed Conditions, was not followed by any Decision until the Case of *Higginson v. Clowes*; and in *Drewe v. Warmington* (b) Lord Alvanley, with *Gunnis v. Erhart* before him, admitted Evidence to explain, and almost to contradict, the printed Particular; certainly not understanding himself as contradicting that Case; but clearly expressing his Opinion, that such Evidence ought to be received; and deciding upon it.

If however these Declarations cannot be received as Evidence to explain an Ambiguity, it cannot be refused as a Defence to a Bill for specific Performance of a Contract: a Suit, in which the Defendant may shew, not only what the Agreement was, but under what Circumstances it took place; that in this Instance the Sale, including the Timber, at the Price, that was bid, proceeded from Misapprehension, not only on his Part, but under which all Persons present laboured, influencing them to limit their Biddings: a Case therefore of extreme Hardship; sufficient of itself without Fraud to induce a Court of Equity to refuse its Aid to the Purchaser to obtain so great an Advantage. This Dis-

(a) 1 Hen. Blacks. 289.

(b) At the Rolls, 24th April, 1800.

tinction

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tinction between cancelling and specifically performing an Agreement, receiving parol Evidence in the one Case, to rebut an Equity, refusing it in the other, to alter, explain, or add to, the written Contract, was established in *Savage v. Taylor* (*a*) ; and has been followed in many modern Cases : *Woollam v. Hearn* (*b*), *Ramsbottom v. Gosden* (*c*) : was admitted by Lord Redesdale in *Clinan v. Cooke* (*d*) ; and is particularly illustrated in *The Marquis of Townshend v. Stangroom* (*e*).

The VICE-CHANCELLOR.

The Exclusion of parol Evidence, offered to explain, add to, or in some Way to vary, a written Contract, relative to Land, stands upon Two distinct Grounds : not simply as being in direct Opposition to the Statute of Frauds (*f*) : but also upon the general Rule of Evidence, independent of that Statute. The Writing must speak for itself ; and can receive no Aid from extrinsic Evidence of this more loose and dissatisfactory Nature. That, which is the Rule of Law, prevails equally in Courts of Equity ; which admit no different Rule of Evidence upon this Subject ; and thus far the Rule is perfectly clear ; rejecting parol Evidence offered by the Plaintiff to constitute, vary, or explain, a Contract in Writing concerning Land ; of which he seeks the specific Performance in a Court of Equity. The Difficulty is, how far Evidence is admissible, offered as a Defence against a Bill, praying a specific Performance. Upon that there undoubtedly are many Cases, where the Evidence has been received ; and, without enumerating the Authorities, it may clearly be admitted for that Purpose upon

(a) *For.* 234.(d) 1 *Sch.* and *Le Froy*,(b) 7 *Ves.* 211.

22.

(c) *Ante*, 165.(e) 6 *Ves.* 328.(f) *Stat.* 29 *Ch.* 2, c. 3.

plain

a plain, and obvious Principle; that a Court of Equity is not bound to interpose by specifically performing the Contract; and though the Subject and Import of the written Contract, are clear, so that there is no Necessity to resort to Evidence for its Construction, yet, if the Defendant can shew any Circumstances *dehors*, independent of the Writing, making it inequitable to interpose for the Purpose of a specific Performance, a Court of Equity, having satisfactory Information upon that Subject, will not interpose.

The Rule, admitting Evidence in those Cases, is intelligible and clear. It is admitted, not to vary an Agreement, as it is expressed open to no Objection, and therefore upon the Letter binding, but to shew Circumstances of Fraud; making it unconscientious in the Party, who so obtained it, to insist upon, and unjust in the Court to decree, the Performance.

Fraud is not the only Head, upon which parol Evidence may be received, and, if made out satisfactorily, a specific Performance may be refused. Upon clear Evidence of Mistake or Surprise, that the Parties did not understand each other, it is introduced, not to explain, or alter, the Agreement, but consistently with its Terms to shew Circumstances of Mistake or Surprise, making a specific Performance, as in the Case of Fraud, unjust; and therefore not conformable to the Principles, upon which a Court of Equity exercises this Jurisdiction. There is however considerable Difficulty in the Application of Evidence under this Head; calling for great Caution, especially upon Sales by Auction, least under this Idea of introducing Evidence of Mistake the Rule should be relaxed by letting it in to explain, alter, contradict, and in Effect get rid of, a written Agreement. In Sales by Auction the real Object of introducing Declarations by the Auctioneer or other Persons is to explain, alter, or contradict, the written Contract; in Effect

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formance dis-
cretionary.

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Harrison.

Effect to substitute another Contract; and, independent of Authority, I should be much disposed to reject such Declarations, as open to all the Mischiefs, against which the Statute was directed, and also violating the Rule of Law, which prevailed previously; whether offered by a Plaintiff, seeking a Performance, or by a Defendant, to get rid of the Contract: a Distinction, which it is difficult to adopt, where the Evidence is introduced to shew, that the Writing, purporting to be the Contract, is not the Contract; that there is no Contract between them, if, that, which is proved by parol, does not make a Part of it. That does not depend upon the Principle, on which a Defendant is permitted to shew Fraud, Mistake, or Surprise, collateral to, and independent of, the written Contract: the Object in the other Case being to get rid of the Contract by explaining it away.

I do not recollect any Instance, that Evidence, offered in that View, has been received: but there are Cases, in which it has been rejected. The Case of *Jenkins v. Poppe* (a), which I well remember, was very hard upon the Vendor; who clearly intended, that the Plantation in the Nursery should be valued distinctly from the Timber, which the Defendant was to take with the Estate. It was pressed, that at the Auction a distinct Statement was made, that there was to be a separate Valuation of the Nursery; and that the Defendant, or his Agent, was present, and heard that Declaration: but the Opinion of the Court was clear, that Evidence of that Declaration could not be received; being offered to supply a Defect; to alter in some Respect the written Import of the Contract.

The same Decision has been made in other Cases. That, which comes nearest this, is *Ramsbottom v. Gor-*

(a) In the Court of Exchequer: stated 15 Ves. 521.

den. (a); in which the parol Evidence seems to have had the Effect in some Degree of altering the written Contract; which was silent as to the Expence of making out the Title: but according to the general Rule the Vendor without Stipulation to the contrary must bear the Expence of making out his own Title. If the Evidence there offered can fairly be brought under the Head of Mistake, the Defendant, who sold reluctantly, having uniformly intended, and given Instructions accordingly, that the Expence should be borne by the Purchaser, that does not infringe upon the Principle I have stated, that parol Evidence of Fraud, Mistake, or Surprise, may be received as a Ground of Defence against a specific Performance.

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CLOWES
v.

HIGGINSON.

Vendor to be
at the Expence
of making out

No Authority having decided, that Evidence can be received except upon one of those Grounds, these Declarations are offered, where the Parties have contracted in Writing upon a Subject, distinctly adverted to in their written Contract; which makes a Provision for it, whether explicit and satisfactory is not material: but, as there is no Fraud, Mistake, or Surprise, the Evidence of these Declarations must be rejected; as it was rejected in the other Cause between the same Parties by the Master of the Rolls; who certainly left the Question open as to these Defendants: but, my Opinion being, that this Evidence is offered to contradict, explain, or vary, the written Contract, and not for any of the Purposes I have stated, as forming Exceptions, the Evidence is equally inadmissible in this Case.

The Evidence having been rejected, the following Judgment was pronounced by the VICE-CHANCELLOR.

(a) *Ante*, 165.

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The Bill in the other Cause between these Parties was dismissed without Costs : the *Master of the Rolls* certainly not deciding, what would be the Effect of a Bill for specific Performance, filed by the other Party, the Defendant in that Cause ; but conceiving, that a specific Performance ought not to be decreed against him, having purchased under a Mistake, to be fairly collected from the Circumstances, disclosed by the written Contract, and appearing before the Court. The *Master of the Rolls* certainly puts no direct Construction on the Contract ; observing upon the Difficulty, that attends any Construction of it ; and not determining, that the Defendant's is preferable, concludes, that, admitting it to be erroneous, he should not be held bound to perform the Contract in the Plaintiff's Sense ; leaving it not absolutely decided, which was the right Construction ; and, even supposing the Plaintiff's the true one, if the Terms were so ambiguous as to lead the Defendant to a different Construction, who consequently purchased under a Mistake, he should not be compelled specifically to perform the Contract. The *Master of the Rolls* in forming that Conclusion adopts Lord Thurlow's Opinion in *Calverley v. Williams* (a) ; and seems to think, the Consequence of such a Mistake would be, that in Reality there was no Agreement between them ; that, misunderstanding each other, the one proposing to buy one Thing, the other to sell another, a Contract, so founded in Mistake, cannot consistently with Justice be executed ; as the Effect would be, that the one must pay £2000 more, or the other receive £2000 less, than he intended.

That Bill being dismissed, this Bill is filed by the Defendant in that Cause ; desiring, that his Construction may be put upon the Agreement ; which is resisted by the Ven-

(a) 1 Ves. jun. 210.

dors,

dors, standing on their Construction; according to which they never intended to sell the Timber. Here then is a Contract in Writing, differently construed by the Two Parties; and the Court has been unable to put any Construction upon it; coming merely to the Conclusion, that there was a Mistake; and the only Distinction between the Cases is, that now the Vendors are the Defendants; and the Mistake and Ambiguity is rather to be imputed to that Party, whose Agent framed the Particular. With that single Exception, that the one may be considered as not so much the Author of the Agreement, though it is signed by both, these Parties are in precisely the same Situation; and this Cause comes before the Court under the same Circumstances: a Bill for the specific Performance of an Agreement, founded in Mistake.

Different Interpretations have been put upon the eighth Article of this Particular. It has been represented as a mere Repetition of what is said before as to the Timber on Lots 4 and 5: or that, if carried farther, it must be confined to Lot 2: the Seven preceding Articles riding over all the Lots; and the Question is, whether that Article applies to Lot 2 alone, to Lots 4 and 5 alone, or to all the Seven Lots. Applied to Lots 4 and 5, it is a mere Repetition of what had been already provided for; and there was no Use in adding that Condition with reference to those Lots. Was it then intended to apply to Lot 2 only? That derives considerable Argument from the preceding Part of the eighth Condition, applicable to that Lot exclusively, and from the special Provision for a separate Valuation of the Timber upon Lots 4 and 5: but is not very consistent with the Description of the Timber, which the Particular holds out as a Temptation to Purchasers as to Lot 2 as well as Lot 1. The Effect upon this Construction must be, that as to both those Lots, though the Purchaser is to have

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all the Inducement to bid, that would be derived from the Timber, it is to be the Subject of separate Valuation.

Is this Condition then to be applied generally to all the Lots? Upon that Hypothesis it is open to the Observation, that in some Degree it infringes upon the plain Import of all the preceding Conditions, taken together: a separate Valuation being expressed only as to Two Lots. It is extremely difficult to put any Construction upon an Instrument, so loosely and imperfectly expressed in every Part; and, not meaning to say decisively what is the true Construction, if I am forced to intimate an Opinion among all these Difficulties, I incline, as open to the least Objection, to understand the Vendor as stating, with regard to all the Lots, that the Timber shall be separately valued. Describing the Timber on Lots 4 and 5, a separate Valuation of which is expressly directed, as to all the rest he gives, a general Direction, that the Purchaser, meaning the Purchasers of the several Lots, shall take the Timber at a Valuation. What Timber? Can he be conceived to mean the Six Pieces of Elm and Ash; with so much Anxiety repeating that Direction as to those trifling Articles, before expressly provided for? He must be supposed to have some farther Meaning; which, I think, was, that the Purchaser of each Lot shall take the Timber at a fair Valuation, not confined to any Lot specifically; which is not inconsistent with the express Direction as to the Lots 4 and 5.

I do not say decisively, that this is the Construction: nor can I say, that the Vendor did not mean to reserve a subsequent Valuation of the Timber: but the Expression is so ambiguous, that it might mislead the Purchaser. What then is the Result of a Contract, so ambiguous as to lead both Parties to a mistaken Construction, without Fraud or Misconduct in either? A Court of Equity by enforcing

enforcing such a Contract would do gross Injustice. Why is not Mistake, upon which the *Master of the Rolls* let off the Purchaser, equally to let off the Vendor? By enforcing the Contract I must deprive the one of his Estate for £2000 less, or make the other pay £2000 more, than each intended. I do not mean, that any Degree of Doubt is to prevent the Court from putting the best Construction it can upon a Contract: but, if there is such a Degree of Doubt and Ambiguity, that the Court can come to no other Conclusion, than that the Parties did not rightly understand, what the one meant to buy, and the other to sell, and upon that Ground of Mistake the one has been let off, that is a Ground for refusing in a Court of Equity to perform a Contract, the Effect of which must be so much Injustice to one Party or the other. That is the Ground, upon which the *Lord Chancellor* proceeded in *The Marquis of Townshend v. Stangroom* (*a*), and *Lord Thurlow in Calverley v. Williams* (*b*) held, that, one Party intending to buy what the other never intended to sell, there was no Contract. This Case affording the same Ground of Mistake, upon which the other Cause was decided at the *Rolls*, and no Circumstance of Difference, except that the other Party is become the Plaintiff, cannot be distinguished; and must meet the same Fate: the Bill must be dismissed: but in such a Case of innocent Mistake, neither Party meaning to take an Advantage, I will not give Costs.

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The Plaintiff proposed to take the Estate according to the Defendant's Construction; paying for the Timber upon a separate Valuation. This was objected to by the Defendants, as unreasonable after all this Litigation; and the Bill not being framed for that Purpose.

1813,
May 21.

(*a*) 6 *Ves.* 328.

(*b*) 1 *Ves.* jun. 210.

M m 3

Mr.

CASES IN CHANCERY.

1813. Mr. Hart, and Mr. Bell, for the Plaintiff, referred to
 ~~~ Woollam v. Hearn (a); and relied on the Passage in the  
 Clowes Bill, " hereby offering to perform the said Agreement  
 v. " according to the true Intent and Meaning thereof," and  
 HIGGINSON. the Answer, submitting to execute a Conveyance to the  
 Plaintiff on Condition, that he would take the Timber at  
 a Valuation; observing that a Plaintiff, having stated one  
 Construction in his Bill, may adopt another at the Bar;  
 and have Relief accordingly: *Lindsay v. Lynch* (b).

Sir Samuel Romilly, in Reply.

The Offer by the Bill does not bind the Plaintiff to perform the Agreement according to whatever Construction the Court shall put upon it; but adopts a particular Construction; and, praying certainly that it may be performed according to the true Construction, must be understood to mean that, which he has before stated as his Construction. The Bill has no alternative Words: nor could that be the Intention. This Election is most unscientifically insisted on against the Will of the Defendants at the Distance of Five Years, whatever Change may have taken place in the Value of the Estate: the Plaintiff first contending through all this Litigation, that he was to have this Purchase for £2000 less than the Defendant's Price; yet feeling the Bargain so very advantageous, that he is now willing to pay £2000 more.

The VICE-CHANCELLOR.

I feel great Difficulty in compelling the Defendants to convey upon the Terms now proposed. I do not understand the Bill, taken altogether, as meaning that the Plaintiff is ready to perform the Agreement according to any Construction the Court may put upon it; throwing

(a) 7 Ves. 215.

(b) 2 Sch. & Lef. 1.

the

the Construction upon the Court. The Plaintiff has uniformly contended, both at the Rolls and here, from the Commencement of these Suits to the last Decree, that he never made, or intended, any Agreement but to take the Estate with the Timber upon it, with the Exception of Lots 4 and 5; and as Evidence of that he adduces this Paper; to make out his Construction. This is not like the Case, to which it has been compared; a Plaintiff calling upon the Court to construe and execute a Will according to the true Construction; suggesting that, which he conceives to be so: but this Plaintiff merely submits to perform the Agreement, as he intended it; according to the true Intention, as he represents it; that is, to have the Timber with the Estate; never meaning to pay for the Timber separately. The Defendants insist on the contrary Construction, as that, which was intended by them. Though there is but one Paper referred to, containing the Particular, Conditions, and Declarations, in Truth there are Two distinct and opposite Agreements, one insisted on by each Party, as evidenced by that Paper: the one including, the other excluding, the Timber. In such a Case of mutual Mistake, the one not intending to sell, what the other meant to buy, the Court, feeling the Injustice of giving to either a Performance upon Terms, to which the other never agreed, has come to the Conclusion, that there is no Contract between them; that they did not rightly understand each other; and therefore it is not possible without Consent to compel either to take what the other has offered. This Plaintiff having uniformly up to the Hearing insisted on his Construction, as the only Contract between them, not offering to take up the other Construction, which the Defendant was at one Time willing to have performed, it is perfectly different from calling upon the Court to declare the true Construction, and submitting to perform according to that. The Court, having in both Instances considered the Transaction as too ambiguous to form the Foundation of a

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 HIGGINSON.

Contract, cannot now take this Passage in the Answer as the Ground of a Decree for specific Performance against the Will of the Defendants; and compel them to accept Terms, which they once offered, but to which the other Party would not then consent.

The Bill must therefore stand dismissed without Costs.

1813,
 May 26.

HODLE v. HEALEY.

Demurrer to a Bill for Redemption of a Mortgage upon Twenty Years Possession by the Mortgagee over-ruled, upon Allegation of Admission of the Mortgage Title within that Period.

THE Bill stated, that in the Year 1777 the Defendant having contracted with *Sarah Smith and Elizabeth Smith*, an Infant, by her Guardian, for the Purchase of the Equity of Redemption of Two Houses, then in Mortgage for £300 and £200, entered into Possession, paid off the Mortgages, and took Assignments; but did not pay the Purchase-money of the Equity of Redemption; alledging Defects in the Title. In 1782 *Elizabeth Smith* having married *Hodle*; they with *Sarah Smith* filed a Bill against the Defendant for a specific Performance. On the 24th of January, 1784, the Parties to that Suit signed an Agreement, that the Plaintiffs should cancel the original Agreement, and dismiss their Bill with Costs, to be allowed the Defendant in his Account of the Rents and Profits; if the legal and equitable Right then was in, or should afterwards come to, the Plaintiffs in that Suit; and that until Payment of such Costs, &c. there should be no Redemption.

The Bill, farther stating, that the Defendant had ever since continued in Possession as Mortgagee without Account,

count, though Applications had at Times been made to him, set forth a Letter in Answer to one of those Applications, made in June, 1804, by the Plaintiff, whose Wife was dead, leaving One Daughter only: the Defendant in that Letter referring particularly to the Agreement of January, 1784; and generally proposing to advise upon the Interest of the Plaintiff's Daughter. The Bill then alledging, that the Rents had long since liquidated the Incumbrances, prayed an Account and Reconveyance.

To this Bill the Defendant put in a general Demurrer for want of Equity.

Sir Samuel Romilly, and Mr. Barber, in support of the Demurrer, contending that, the Defendant having been upwards of Twenty Years in Possession without Account, the Plaintiffs were not entitled to redeem, and that this Objection may be taken by Demurrer (a), cited the following Authorities:—*Eure v. White* (b), *Knowles v. Spence* (c), *St. John v. Turner* (d), *Isham v. Cole* (e), *Jenner v. Tracey and Belch v. Harvey* (f), *Anon. Ca.* (g), *Aggas v. Pickerell* (h), *Pearson v. Pulley* (i), *Hartpole v. ——* (k), *Conway v. Shrimpton* (l), and *—— v. Lord ——*

(a) See Mr. Cox's Note to *Cook v. Arnham*, 3 P. Wms. 287; and *Aggas v. Pickerell*, 3 Atk. 225; Lord Redesdale's *Treat. Plead.* 254, 255, and the Authorities referred to. *Edsell v. Buchanan*, 2 Ves. jun. 85.

(b) 2 Vent. 340. 1 Eq. Ca. Ab. 313.

(c) 1 Eq. Ca. Ab. 315.

(d) 2 Vern. 418.
(e) 1 Ch. Rep. 68.
(f) In Note to *Cook v. Arnham*, 3 P. Wms. 287.
(g) 3 Atk. 313.
(h) 3 Atk. 225.
(i) 1 Ch. Ca. 102.
(k) 4 Bro. P. C. 369.
(l) 15 Vin. Ab. p. 468, pl. 9.

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—
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Annesley (a), Perry v. Marston (b), Lord Redesdale's Treatise (c), and Foster v. Hodgson (d).

Mr. Hart, and Mr. Cook, for the Plaintiff.

Admitting, that this Court acts by Analogy to the Statute of Limitations (e), and that a Demurrer is as available as a Plea to take Advantage of such a Length of Possession, this Case is not within the general Rule, precluding Redemption: the Defendant having within Twenty Years actually treated the Property as mortgaged. A Plea is, however, evidently the more proper Course; and, as Issue can be taken by the Plaintiff on the Facts set up, ought to be encouraged. This is a Demurrer for want of Equity simply: but the Analogy to the Statute of Limitations does not proceed on that Ground; but opposes a statutory Bar to the Relief. This Defendant in 1804, clearly acknowledged himself a Mortgagee. Demands were made by the Mortgagors even subsequent to that Period; and though at Law the Demand must be by Action, to prevent the Effect of the Statute, in Equity the mere Demand is equivalent.

The VICE-CHANCELLOR.

There is no Doubt, that in 1784 the Estate, of which this Bill seeks a Redemption, belonging to Sarah and Elizabeth Smith, was redeemable. The Question is, whether upon the Facts, stated in the Bill, the Plaintiff is now entitled to redeem. Upon the general Principle there can be no Dispute, that a Mortgagor, coming to redeem

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| (a) 2 Sch. and Lef. 630,
632. | (d) Argued after last Tri-
nity Term. |
| (b) 2 Bro. C. C. 397. | (c) 21 Jac. 1. c. 16. |
| (c) Page 213. | |

after

after Twenty Years Possession by the Mortgagee, without shewing some Act, in which it was treated as a Mortgage within that Period, is too late. Does this Bill then state any Facts, taking this Case out of that general Principle, adopted by Analogy to the Statute of Limitations, and giving the Right to Redemption after the Lapse of Twenty-eight Years? With regard to the Prayer of Discovery, if not entitled to Relief the Plaintiff cannot have the Discovery. By the Import of the Agreement of 1784, the Defendant unquestionably was recognized as a mere Mortgagee. It is said, that Agreement *per se*, followed by no Act, is an executory Contract, establishing his Character of Mortgagee, and making him liable to account: but the Effect of that cannot be more than an actual Mortgage. The Agreement to account gives it a Date at that Time: but if for Twenty Years afterwards he has done no Act as Mortgagee, he is entitled to the Benefit of the Analogy to the Statute. *Elizabeth Smith* was under the Disability of Coverture; and there must have been the Disability of Infancy, until both, being Daughters, came of Age: a considerable Period therefore must have elapsed, before their Claim could be barred.

There is no Doubt, that Advantage may be taken of this Objection by Demurrer; if the Bill so states the Case, that there is nothing to interfere with the Effect of the Lapse of Time, to the Benefit of which the Defendant is entitled: but it is difficult to suppose such a Case; the Bill not alledging something to take it out of the Analogy to the Statute. The Question is, whether this Bill does state any thing, taking it out of that Analogy; and amounting to a Recognition of the Character of Mortgagee: it states, that in 1784 he did in fact hold as Mortgagee, and was accountable as such; that the Plaintiffs had the Equity of Redemption; and made frequent Applications

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HODDE
v.

HEALEY.

Length of Time adopted in Equity by Analogy to the Statute of Limitations.
Plaintiff, not entitled to Relief, cannot have Discovery.

1813.

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HODLE
v.

HEALEY.

Mere De-
mand, without
Process or Ac-
knowledgment,
not sufficient
against the
Statute of
Limitations.

tions for an Account: but the mere Demand of an Account is not alone sufficient to prevent the Effect of the Length of Time. It is represented as equivalent to actual Entry; which is sufficient to keep alive the Right of a Person disseised: but a mere Demand of a Debt, without Process, or any Acknowledgment, is not sufficient to take the Case out of the Statute of Limitations. Here is, however, farther, the Correspondence in 1799, 1801, and this Letter in 1804; by which he refers expressly to the Agreement of *January, 1784*; admitting clearly, that he was at that Time a Mortgagee; and holding out the Terms of Redemption. Is not that a sufficient Recognition of his Character of Mortgagee; claiming the Benefit of it himself; and does it not preclude his setting up any different Title from that under the Agreement of 1784; by which they clearly stand in the Relation of Mortgagor and Mortgagee?

It is said, that Lord *Thurlow's* Opinion was, that a mere Declaration of the Party, that he is Mortgagee, is not sufficient, unless some Act is done, to keep alive the Character; and the Case of *Perry v. Marston* (a) is cited: but, I do not collect that from Lord *Thurlow's* Reasoning. The Question there was, whether a verbal Declaration by the Mortgagee after a Suit commenced was to be opposed to his Answer, positively setting up a distinct and separate Title. Lord *Kenyon's* Opinion was, that even under such Circumstances his mere Declaration was sufficient: but Lord *Thurlow*, so far from concurring in that, says directly the Reverse: "I take it, that a Man, taking Notice by a Will, or any other deliberate Act, wherein he recites, that he is Mortgagee, either of those Circumstances will take the Case out of the Rule, that a Mortgagor shall not redeem after Twenty Years;" and in the Conclusion seems to lay down the Principle, that if a Party will admit,

(a) 2 Bro. C. C. 397.

that

that he is only a Mortgagee, he is bound by such Admission; and cannot resist Redemption.

The single Question before me is, whether the Defendant, in 1804 referring to the Agreement of 1784, does not thereby admit, that he was in Possession solely in the Character of Mortgagee upon the Footing of that Agreement. Upon that Ground I think, there is sufficient alledged in this Bill to sustain the Right of Redemption; and therefore this Demurrer must be over-ruled.

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HEALEY.

GRIFFITH v. WOOD.

1813,
May 21.

A DEMURRER having been over-ruled in this Cause, After Demur a Motion was made, as of course, for a Month's Time to plead or answer.

The Register (*a*) objected, that the Order for Time could not be taken except in the common Way, and upon the usual Allegation.

Mr. Cooke, in support of the Motion.

This Motion is made in the common Way, except in not praying Time to demur: the Defendant having already taken that Course. There is no Rule, that an Order for Time cannot be had after a Demurrer over-ruled. The general Rule certainly is not to permit more than one Dilatory: but a Plea is considered as an Answer. If the Defendant is not entitled to Time, as of course, the Con-

(a) Mr. Walker.

sequence

CASES IN CHANCERY.

1813.
 ~~~  
 GRIFFITH  
 v.  
 WOOD.

sequence must be, that after the Defendant allowed his  
 would be instantly in Contempt, and subject to Attachment;  
 and, if he is advised, that he is not bound to answer,  
 the Effect will be most unjust. No Objection to this  
 Motion can be stated from the Reports or Books of  
 Practice.

*The Vice-Chancellor made the Order.*

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1813,  
 May 21.

Injunction,  
 restraining an  
 Executor,  
 claiming under  
 the Will, and  
 also by a Gift  
 from the Testatrix  
 in her  
 Life, from  
 selling, upon  
 Affidavit of un-  
 due Influence,  
 &c.

## EDMUNDS v. BIRD.

A MOTION was made for an Injunction to restrain  
 an Executor from converting Furniture and other  
 specific Property into Money, upon strong Affidavits of  
 his having obtained compleat Influence over the Testatrix,  
 at an advanced Age; that from the Time she became  
 acquainted with him she fell into the Habit of excessive  
 Intoxication; that he prejudiced her against the Plaintiff  
 and all her other Connections; and prevailed upon her to  
 make a Will; also claiming the Property in his Possession  
 as a Gift from the Testatrix in her Life: the Plaintiff  
 insisting, that she was equally incompetent to either Act.

Mr. Cooke, in support of the Motion.

An Administration *pendente lite* might have been obtained in the Ecclesiastical Court: but that would not secure the Property, of which the Defendant has got Possession; and is about to sell; and the fair Presumption from the Circumstances, disclosed by this Affidavit, is, that this Property, if converted into Money, will be irrecoverable.

able. The Case of *King v. King* (*a*) is a strong Authority for the Jurisdiction; and Lord Erskine's Expression in *Richards v. Chave* (*b*), that this Court ought never to interfere, where the Spiritual Court can grant an Administration *pendente lite*, must be taken with the previous Qualification, that the Property was not proved to be in Danger. The Defendant cannot sustain much Inconvenience; as, if he can make out a Case, or by Security satisfy the Court, that the Effects will be forthcoming, he may put in an Answer; and get rid of the Injunction.

1813.  
EDMUND  
v.  
BIRD.

### The VICE-CHANCELLOR.

A strong Ground for the Motion is, that an Administration *pendente lite* would not help the Plaintiff: the Defendant insisting upon a Title by Gift *inter vivos*, which, as well as the Will, is impeached. That Ground, I think, will sustain the Motion.

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The Order was made.

(*a*) 6 Ves. 172.      (*b*) 12 Ves. 462.

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KENDALL, *Ex parte.*

1813,  
May 25.

THE usual Order for Attendance had been made upon a Petition to stay a Bankrupt's Certificate: but the Bankrupt was not served.

Bankrupt, not served with a Petition to stay his Certificate, on which an

Attendance had been ordered, entitled to his Certificate; and not bound by taking Copies of the Affidavits.

*The*

## CASES IN CHANCERY.

1813.

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 KENDALL,
Ex parte.
The Lord Chancellor.

This Certificate must be allowed. The Bankrupt, not having been served with Notice of the Petition, upon which an Attendance was ordered on the next Day of Petitions, had a Right to call for his Certificate on the Morning of that Day; and, though he afterwards took Office Copies of the Affidavits, I will not bind a Bankrupt to his Prejudice by that Act, when it was not necessary for him to take any Notice whatsoever of the Petition; as it must be understood, that if a Bankrupt is not served with the Petition to stay his Certificate, upon which an Attendance is ordered on the next Day of Petitions, the Certificate shall go of course.

1813,
May 26.

Purchaser
 discharged on
 Motion upon
 Affidavit of
 Imprisonment
 for Debt and
 Insolvency.

HODDER v. RUFFIN.

THE Plaintiffs moved to discharge a Purchaser and that the Estate may be re-sold with the Approval of the Master; stating by Affidavit, that since the Confirmation of the Report the Purchaser was confined for Debt in the King's Bench Prison; and, as the Deponent has been informed and believes, is become wholly insolvent, and incapable of completing the Purchase. The Purchaser was served; but did not appear.

Mr. Bell, in support of the Motion, and Mr. Richards, (*Amicus Curiae*), stated, that the Practice in order to discharge a Purchaser formerly was different, but the recent Practice authorised this summary Application.

The Vice-Chancellor observing, that the Practice was convenient, made the Order.

WHITWORTH

WHITWORTH v. DAVIS.

1813,
May 19; 21.

JAMES Paine, having contracted for a Purchase from the Defendant *Graham*, agreed in August, 1810, to sell Part of the Property contracted for, to *James Davis*; who in August 1811 agreed to sell the Subject of his Purchase to the Plaintiff. These different Contracts remaining unexecuted, *Davis* in April, 1812, became Bankrupt. The Bill, filed against *Graham*, *Paine*, the Assignees under the Commission of Bankruptcy, and against *Davis*, the Bankrupt, prayed, that the Agreement between *Davis* and the Plaintiff, might be specifically performed, and that all proper Parties might concur, and an Injunction to restrain the Assignees from proceeding for Rent against the Plaintiff in Possession. To this Bill the Bankrupt *Davis* demurred.

Demurrer by a Bankrupt to a Bill joining him with his Assignees in Charges and Prayer for Relief; viz. the specific Performance of a Contract, previous to his Bankruptcy, allowed.

Distinction upon Fraud.

Whether a Bankrupt can be made a Party merely for Discovery, and to maintain an Injunction, *Quare*.

Mr. Owen, in support of the Demurrer.

The Bankrupt has been improperly made a Party, his Interest having passed by the Assignment; and the Assignees being Parties. In ordinary Cases a Bankrupt cannot be made a Party; and there are no special Circumstances, justifying a Departure from the general Rule. No Relief is prayed, nor any Case made, against him. He is to be regarded as a mere Witness; whom the Plaintiff may examine, though the Assignees cannot. The Case of *Fenton v. Hughes* (a) states the Principle, that a mere Witness shall not be made a Defendant; and this Bankrupt does not fall within any of the Exceptions to the general Rule, mentioned in that Case, as Agent to sell, Auctioneer, Secretary or Book-keeper to a Corporation.

(a) 7 Ves. 287.

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N a

Sir

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WHITWORTH
v.
DAVIS.

Sir *Samuel Romilly*, and Mr. *Meggison*, for the Plaintiff, citing the Cases of *Drake v. The Mayor of Exeter* (*a*), and *Moyses v. Little* (*b*), as Authorities, that the Interest in the Bankrupt's Contract had not passed to his Assignees, contended, that, admitting the Bankrupt has no Interest, the Plaintiff is entitled to bring him before the Court, and have his Answer; as, if necessary to obtain an Injunction against Assignees the Plaintiff may make the Bankrupt a Party; and the Court will not on the Answer of the Assignees, that they know nothing of the Matter, dissolve the Injunction; which is retained until the Bankrupt's Answer comes in, which may be read against the Assignees in support of the Injunction, though perhaps not at the Hearing. In *Glassford v. Jaffrey*, which lately occurred in the Exchequer, the Bankrupt's Answer was read against his Assignees.

Mr. *Hart*, and Mr. *Cooke* (*Amici Curiae*), said, the Lord Chancellor had intimated, that it might be necessary to make a Bankrupt a Party, in order to enable the Plaintiff to frame the Interrogatories, on which he was to be examined as a Witness; and referred, for the general Doctrine, to *Le Texier v. The Margravine of Anspach* (*c*).

Mr. *Owen*, in Reply.

Few Propositions would lead to greater Hardship than that a Bankrupt should be made a Party in such a Suit as this; having no Property even to pay for the Answer he is called upon to put in; though a Bill of Discovery may admit the Distinction, that he would be entitled to his Costs. Fraud is the single Exception, upon which a Bankrupt, or any other Person, who is a mere Witness, can be

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| <i>(a)</i> 1 Ch. Ca. 71. 1 Nels.
<i>Ch. Rep.</i> 102. 1 Eq. Ca. Ab.
53, pl. 1. | <i>(b)</i> 2 Vern. 194.
<i>(c)</i> 15 Ves. 159. |
|--|--|

made

made a Party. The Reason, that without this Discovery by the Bankrupt the Plaintiff will not know how to point his Case against the Assignees cannot apply in this Instance. In *Glassford v. Jaffrey* the Assignees, referring to the Answer of the Bankrupt, incorporated it with their own.

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The VICE-CHANCELLOR.

Upon the Argument of this Demurrer it was contended in support of the Bill, that *Davis*, the Bankrupt, was properly made a Party in respect of the Interest he had in the Subject: the Right to have the Contract performed, or to resist it, being a Subject, that did not devolve upon the Assignees; and Two Cases were referred to: *Moyses v. Little* (a), and *Drake v. The Mayor of Exeter* (b), to a certain Degree warranting the Proposition, that the Interest, which the Bankrupt had in a Contract, does not devolve upon his Assignees. If that Proposition can be maintained, this Bill is properly framed; the Bankrupt being mixed with the other Defendants in the Charges of the Bill, and Relief prayed against him as well as the others; that he may join in the Conveyance. That Proposition however appears to me not to be tenable. It proves considerably too much; as, if the equitable Interest in the Contract, does not devolve upon the Assignees, they ought not to have been made Parties; but the Bankrupt alone. That is contrary to all Authority; and was relinquished by Sir *Samuel Romilly* upon the clear Ground, that all legal and equitable Interest in the Property devolves upon the Assignees; that they are competent to sustain the Case in point of Interest; and therefore the Bankrupt is not a necessary Party. That is expressly stated in *De Golls v. Ward* (c) in the Note to *Wych v. Meal*.

May 26.

Effect of Assignment under a Commission of Bankruptcy; passing all legal and equitable Interest.

(a) 2 Vern. 194.

102. 1 Eq. Ca. Ab. 53, pl. 1.

(b) 1 Ch. Ca. 71. 1 Nels.

(c) 3 P. Will. 311, n. 1.

N n 2

The

1813.

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Warrworth  
v.  
Davis.

The other Ground, alleged in support of the Bill, is more questionable: whether the Bankrupt is not a proper Party for the Purpose of Discovery; and to sustain the Injunction, if his Answer affords Ground for it. Sir *Samuel Romilly* stated the Practice to be to make the Bankrupt a Party, with the View to read his Answer for the Purpose of sustaining the Injunction against his Assignees; and that receives some Authority from what is stated by *Lord Redesdale* (*a*): that “ a Bankrupt, made a Party “ to a Bill against his Assignees touching his Estate, may “ demur to the Relief, all his Interest being transferred to “ his Assignees: but it seems to have been generally “ understood, that, if any Discovery is sought of his Acts, “ before he became a Bankrupt, he must answer to that “ Part of the Bill for the Sake of Discovery; and, to “ assist the Plaintiff in obtaining Proof; though his “ Answer cannot be read against his Assignees; and other- “ wise the Bankruptcy might entirely defeat Justice.”

No Authority is cited for that: but *Lord Redesdale's* Judgment is confirmed by the Intimation from the Bar of the current Opinion, that the Bankrupt may for the Purpose of Discovery be a Party in a Bill for an Injunction. I have not been able to find a Case, that supports that Opinion: but the Knowledge, that it is the received Practice, is sufficient to induce me not lightly to disturb it. There is certainly great Convenience in this; as in such a Case all the Transaction may be known to the Bankrupt alone; and the Party, seeking Relief, would be entirely deprived of it, as far as regards the Injunction, if a Discovery cannot be obtained from the only Party, having a Knowledge of the Transaction. There is however a Difficulty consistently with the Rule and Principle, to conceive how the Bankrupt's Answer can be read against his Asig-

(*a*) *Lord Redes. Tr. Ch. Pl. 142-3.*

nees even for the Purpose of an Injunction, when clearly it could not be read against them at the Hearing.

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T.

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The Case of *Glassford v. Jaffrey*; in the Court of Exchequer, which was cited as an Authority for reading the Bankrupt's Answer against his Assignees, affords no Assistance upon this Point; all the Assignees having put in distinct Answers, craving Leave to refer to the Answer of the Bankrupt, and the Schedules to that Answer; not having any Knowledge themselves upon the Subject. In that Instance therefore the Bankrupt's Answer was properly read against them.

There is one direct Authority, that the Bankrupt ought not to be made a Party even for the Purpose of Discovery: *Griffin v. Archer* (a). The Note is short: but I have inquired from the Judges, who decided that Case; and find the Report of the Decision, that the Demurrer was allowed, is correct. The Case of *King v. Martin* (b) does not bear upon the Subject: the Opinion of the Court being, that there might be Relief against the Bankrupt upon the Fraud; who is stated expressly to be a material Party, against whom a Decree might be made. There was another late Case, *Cooke v. Marsh* (c), in which I understand from general Information only, that the Demurrer was allowed: but I do not find distinctly, that it was the Demurrer of the Bankrupt.

The Case standing thus upon the Authorities, how is it on Principle? The Case of *Fenton v. Hughes* (d) lays down a broad Principle, that would exclude this Bankrupt

(a) 2 *Anst.* 478, cited
ante, 2 *Ves. jun.* 643.

(c) In *Chancery, Trin.*
1811.

(b) 2 *Ves. jun.* 641.

(d) 7 *Ves.* 287.

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Rule, that a mere Witness, having no Interest, ought not to be a Party.

Exceptions to that Rule.

as a Party; viz. that a Person, who has no Interest, and is a mere Witness, against whom there could be no Relief, ought not to be a Party. A Bankrupt stands in that Situation: a competent Witness, having no Interest, against whom therefore no Relief can be had at the Hearing, he falls precisely within that general Rule; and the Cases of Exception, stated by the *Lord Chancellor*, do not comprehend him. So in the Case of *Le Texier v. The Margavine of Anspach* (*a*), where the general Rule is laid down, the Case of a Bankrupt is not stated as constituting an Exception. The Principle is certainly against making him a Party; and the Instance of Exception, put by the *Lord Chancellor* in *Fenton v. Hughes*, is mentioned, not with Approbation, but as standing upon Authority only; having been introduced by *Lord Talbot* not upon a very satisfactory Principle.

The Conclusion is therefore, that the Bankrupt is within the Principle; and is not one of the Persons included in the Exceptions. Therefore upon Principle and the direct Authority of the Court of *Exchequer*, opposed by no Decision, this Bankrupt ought not to be made a Party even for the Purpose of Discovery. It is not however necessary to decide that in this Case; and, merely stating the Result of my Inquiries, I desire not to be understood as opposing my Opinion, though formed upon a Consideration of the Principle and Authorities, to any current Opinion, prevailing as to the Practice: this Bill being framed with the View of considering the Bankrupt as having such an Interest, that Relief may be had against him; involving him in the Charges with the other Defendants; and praying Relief generally against him. Considered as a proper Party, against whom the Prayer of Relief ultimately may be sustained, he could not move for his Costs,

(*a*) 15 *Ves.* 159.

as a Defendant, against whom Discovery only is prayed, and no Decree can be made. It is then perfectly clear, that, Relief being prayed against a Defendant, who can be a Party only for the Purpose of Discovery, he may demur. Upon that Ground, that Relief is prayed against this Bankrupt, when at all Events a Discovery only can be sought against him, it seems to me, that, without determining the general Question, this Demurrer may be sustained.

1813.

WHITWORTH

v.

DAVIS.

## BARING v. NASH.

1813,  
May 26. 31.

THE Bill stated, that under an Indenture of Assignment the Plaintiff is possessed of, or well entitled for the Remainder of a Term of Five Hundred Years, commencing in 1740, to one undivided Tenth Part of certain Premises; that the Defendant Nash, is "seised in Fee-simple or otherwise well entitled to Seven other Tenth Parts" of the same Property, and that the Defendant Graves in his own Right, or in the Right of the Defendant Caroline his Wife is "seised in Fee-simple of or otherwise well entitled to the Two other or remaining Tenth Parts." The Bill prayed a Partition.

To this Bill the Defendant Nash demurred on the Ground, that it was not stated with sufficient Certainty, what Estate this Defendant had in the Seven undivided Tenth Parts of the Property, which it was in the Bill stated this Defendant is seised in Fee-simple of or otherwise entitled to.

Bill for Partition by Lessee for Years.

Demurrer, for Cause, that the Bill stated the Defendant's Estate not with sufficient Certainty, viz, that he "is seised in Fee, or "otherwise "well entitled "to," and *or cœtenua*, that the Reversioner was not a Party, overruled.

## CASES IN CHANCERY.

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BARINGv.  
NASH.

Another Ground of Demurrer was taken ~~ore tenus~~; that all Persons interested were not brought before the Court.

Sir *Samuel Romilly*, and Mr. *Meggison*, in support of the Demurrer, contended, that there was no Instance of a Decree for Partition against Persons, having only a partial Interest, those, having the permanent Interest, not being before the Court; observing, that the Advantage of a Partition in Equity over that at Law consisted in all the Parties being before the Court and bound.

*Mr. Trollope*, for the Plaintiff.

The Plaintiff could not state the Defendant's Interest in any other Manner. It would have been sufficient, had he suggested a pretended Claim by the Defendant; and called for a Discovery of it: or there could be no such Thing as Partition. An Estate in Fee is expressly alledged; and the Words "or otherwise entitled" are merely formal.

As to making the Reversioner a Party, it was not only unnecessary, but he might have demurred. This Bill merely affects the present Possession; not touching the Reversioner's Interest. Before the Stat. of *Will.* and *Mary* (a) there was no Partition here, but between Tenants in Fee; but ever since it has been made between Tenants for Life.

*The VICE-CHANCELLOR.*

May 31. As to the first Ground of Demurrer, that, which ap-

(a) 8 & 9 W. & M. c. 31. Litt. 169, a, and Authorities On Partition in general, see there cited.

Mr. Hargrave's Note, 2 Co.

pear

pears upon the Record, that the Interest of the Defendant is not stated with sufficient Precision, the Bill stating, that he is seised in Fee-simple of, or otherwise well entitled to, Seven other undivided Tenth Parts, my Opinion is, that this Cause of Demurrer is not well founded. The Plaintiff, who has, as he was bound to do, stated his own Interest with Precision, cannot be supposed so cognisant of the Nature of the Defendant's Interest; which he states therefore in this Way; and calls for a Discovery of the Extent of it; and prays a Partition.

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~~  
BARING  
v.  
NASH.

The other Ground of Demurrer, alledged *ore tenus*, brings forward a much more important Question, whether a Bill for Partition can be maintained by a Person, having only a limited Interest, by a Term of Five Hundred Years in One Tenth Part; and the Owner of the Inheritance of that Tenth not being a Party; as the Owners of the Inheritance of the other Nine Parts are. It is said, that without the Owner of the Inheritance of this Tenth Part, in which the Defendant has the Term, the Court has not before it all the Parties interested in the Subject; and therefore cannot make an effectual Decree for a compleat Partition of the whole Estate, binding all Parties interested in the Estate.

The first Consideration is, whether, if the Owner of the Inheritance of this Share had been a Party, the Plaintiff, as Owner of the Term of Five Hundred Years, entitled to Partition at Law and in this Court commensurate to his Interest, could compel him to join in this Partition; and pray this Relief, against his Will, that he might be decreed to concur with the other Parties in making Partition of this Estate, not for a Term of Years only, but for ever. No Authorities were cited on either Side.

It

1813.

BARING  
v.  
NASH.

No Objection to a Partition from the Minuteness of the Interest, the Inconvenience, Difficulty, or Reluctance of the other Tenants in Common.

Under a Bill for Partition no Costs to the Hearing. Costs of the Partition and Conveyance in Proportion to the Interests.

It is clear, the absolute Owner of a Tenth Part may compel the Owners of the other Nine to concur with him; and there would be no Objection from the Minuteness of this Interest, the Inconvenience, or the Reluctance of the other Tenants in Common, if no Objection could be taken to the Plaintiff's Title: Partition being Matter of Right: whatever may be the Inconvenience and Difficulty: *Parker v. Gerard* (a), and *Warner v. Baynes* (b); and the Habit of the Court is not to give Costs to the Hearing, and to divide the Expence of the Conveyance and Partition in Proportion to the Interests (c).

The Question is, whether the Lessee for Years of One Tenth Part has the same Right and Equity against the Owner of the Inheritance of that Tenth; and clearly the Lessee has not the same Right to compel that Owner to concur. As between the Lessee and the Remainder-man in Fee they are not as Tenants in Common. They between them represent the absolute Interest in that Tenth Part: but each has a separate, independent, Interest; and the Proceeding of the one can neither avail, nor bind, the other. As the Owner of the Inheritance therefore cannot be compelled to join at the Instance of the Lessee, a permanent Partition cannot take place, if the Owner of that Tenth Part will not concur. If therefore he was a Party no Relief could be prayed against him: nor would he be bound by the Partition; or any Right of his precluded to consider the Freehold as undivided notwithstanding any Division of the temporary Interest. For that Purpose the Owner of the Inheritance of this Share is not a necessary Party.

(a) *Amb.* 236.(b) *Amb.* 589.(c) *Agar v. Fairfax, Agar v. Holdsworth*, 17 Ves. 533.

Still

Still however the Question remains, whether, the Owner of the Inheritance not being a Party, a Court of Equity will grant a Partition at the Instance of the Lessee for Years; or leave him to Law, if it cannot interpose effectually for the Purpose of a permanent Partition; and the Inconvenience of a temporary Partition may be urged; creating, as the Freehold is not to be divided, the Necessity of coming again after the Expiration of the Term: but against this Partition no Authority was cited: nor can I find any Authority, that this Application for a Partition cannot be made by a Person, having a limited Interest.

Then how does it stand upon Principle? Courts of Concurrent Jurisdiction have a concurrent Jurisdiction with Courts of Law upon Partition; more convenient, where the Interest is much divided. With that concurrent Jurisdiction is a Court of Equity to adopt the Principle, which prevails at Law, or to act upon a different Principle? Originally Tenants in Common and joint Tenants could not have compelled the others to come to a Partition, which was remedied by the Statute 31 *Henry 8*, giving them the same Right, that Parteners had; and in the following Year that was extended to Persons, holding limited Interests only, for Life or Years. From that Time therefore, whatever is the Inconvenience of these partial Partitions, the Law has been established, that a Tenant for Years, though he has only that limited Interest, may compel Partition by Writ; and if that is clear, a Court of Equity cannot upon the Inconvenience of a temporary Partition permit a Demurrer to a Bill by a Plaintiff, having a Quantity of Interest, that would entitle him to the Writ.

1813.  
~~  
BARING  
v.  
NASH.

Partition between Tenants in Common and joint Tenants by Stat. 31 Hen. 8: extended by Stat. 32 Hen. 8, to limited Interests, for Life or Years; and the same Right in Equity by Bill as at Law by Writ.

From the general Authorities nothing is to be found contradicting this; and there is something to be collected, which confirms it. In the Case of *Wells v. Slade* (a), the

(a) 6 *Ves.* 498.

*Lord*

1813.

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BARING  
v.  
NASH.

*Lord Chancellor* says, "At all Events you are entitled to a Partition during the Life of the Tenant for Life;" certainly conceiving, that there may be a limited Partition during a Tenancy for Life; and I cannot perceive any Distinction in this respect between such an Interest and a Term of Years: both give equal Title to the Writ under the Statute 3 & Henry 8.

In the Case of *Turner v. Morgan* (*a*), the *Lord Chancellor* says, "It cannot be denied, that a Partition is due now under the Statute, to divide this Species of Inheritance; and I know no Rule but by considering the Commission as due in a Case, where the Writ would lie;" certainly referring to the Rule of Law, by Analogy to which the Conduct of a Court of Equity should be regulated: these Authorities establishing the Principle, that a Rule of this Kind, involving the Right of an Individual, should be the same in both Courts; and therefore Tenant for Years, if he would be entitled to Partition at Law, ought to have it in Equity.

The only Authority, that appears to consider the Proceeding by a Bill for Partition as Matter, not of Right, but of Discretion, is a Passage in *Cartwright v. Pulteney* (*b*); where *Lord Hardwicke* says, "the Plaintiff must shew a Title in himself in a Moiety, and not alledge generally, that he is in Possession of a Moiety; and this is stricter than a Partition at Law where Seisin is sufficient."

Discretion in  
Equity to re-  
fuse Partition  
upon a suspici-  
ous Title: but,  
if clear, as the

This must be taken with the Context. It is stated to be discretionary, where there are suspicious Circumstances in the Plaintiff's Title; as in that Case a Suspicion of

(*a*) 8 Vcs. 143.

(*b*) 2 Atk. 236.

Writ would lie the Commission is due of Right.

Forget.

**Forgery.** Where the legal Title is under such suspicious Circumstances, a Court of Equity may well pause in directing Partition: but if the Title is clear, a Partition is Matter of Right; and it is expressly stated in *Parker v. Gerard* (a), that there is no Instance of not succeeding in such a Bill, but where there is not Proof of Title in the Plaintiff; and in the Case of *Cartwright v. Lord Bath*, the Court gave Leave, and Time for the Plaintiff to make out his Title.

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BARING  
v.  
NASH.

Therefore both upon Principle and Authority this Plaintiff's Title to the Term being clear, and liable to no Objection, he is under no Necessity of making the Owner of the Inheritance of this Tenth Share a Party: nor would it be proper to do so; against whom no Relief could be had, and the Discovery would be useless. The Plaintiff is therefore entitled to the same Partition here, to which he would clearly under the Statute be entitled at Law. Upon these Grounds this Demurrer must be over-ruled.

(a) *Amb.* 236.

# T A B L E OF C O N T E N T S.

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## A.

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2. Auctioneer may limit his general Power of Agency: but only by Declaration, equivalent in legal Effect to the general Authority. Upon that Principle Evidence of loose Declarations at the Sale not admitted. 210

### ALIMONY.

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### AMENDMENT.

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## ANSWER.

1. Liberty by supplemental Answer to correct a Fact, by stating, viz. Possession was taken under the Contract of Part of the Premises only, not of the whole, as stated in the Answer, the Defendant being previously in Possession as Tenant of the other Part, and swearing that the Mis-Statement was merely from not conceiving it material, refused, without an Affidavit, that he meant by the original Answer to swear to the Fact, as it really was. *Liresey v. Wilson.* *Page* 149
2. Instances of permitting and refusing Amendment by supplemental Answer. 150
3. An Amendment in the Title of an Answer being necessary, viz. instead of "the farther Answer to "the original amended Bill," entitling it "the farther Answer to the "original

" original Bill and the Answer to  
" the amended Bill," the Answer  
so amended must in the Case of a  
Peer be again attested upon Honor;  
as in the Case of a common De-  
fendant it must be re-sworn. *Pea-  
cock v. The Duke of Bedford.*

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### B.

### BANKRUPT.

1. Upon Petition to stay a Bank-  
rupt's Certificate Affidavits, filed  
after the Petition presented, ad-  
mitted only in Reply; according  
to the General Order (16th Nov.  
1805.) *Ex parte The Royal Bank  
of Scotland.*

5

2. General Rule, that a Petition to  
stay a Bankrupt's Certificate fail-  
ing is dismissed with Costs; unless  
Misconduct of the Bankrupt. *Ex  
parte The Royal Bank of Scotland.*

Page 5

3. Commission of Bankruptcy not  
supersedable under the General  
Order, (26th June, 1793) where,  
due Diligence being used, the Ad-  
judication was prevented by keep-  
ing Evidence out of the Way. *Ex  
parte Freeman.*

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4. A Writ of *Supersedeas* and a new  
Commission being obtained with-  
out disclosing, that an Attendance  
had been ordered upon a Petition  
to compel the Attendance of Wit-  
nesses under the first Commission,  
the Writ was quashed, and the  
second Commission superseded. *Ex  
parte Freeman.*

24

5. No second Commission of Bank-  
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